FILED
APR 26 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 908

J. LELAND ANDERSON,

Appellant,

vs.

ROGER I. KNOX,

Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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OCTOBER TERM, 1961

No. .....

J. LELAND ANDERSON, *Appellant,*

vs.

ROGER I. KNOX, *Appellee.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

J. Leland Anderson, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on December 4, 1961.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit (*infra*, Appendix B, p. 18) is reported at 297 F. 2d 702. The opinion of the United States District Court for the District of Hawaii (*infra*, Appendix A, p. 1) is reported at 159 Fed. Supp. 795, and its Findings of Fact and Conclusions of Law at 162 Fed. Supp. 338.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 4, 1961 (*infra*, Appendix B, p. 18). A timely petition for rehearing was denied on February 28, 1962 (*infra*, Appendix C, p. 78). The jurisdiction of the Court is invoked under 28 U. S. C. §1254(1). The Order Staying Mandate issued March 31, 1962 by Court of Appeals for the Ninth Circuit granted a stay provided petition for writ of certiorari is filed by April 23, 1962. If said petition be not filed by said date, the mandate is stayed for 20 more days but only upon condition that petitioner give security in penal sum of $10,000.

Questions Presented.

1. Is Due Process, or Equal Protection of the law denied by a judicial decision which holds an insurance agent liable for fraud on the basis of his stated opinion as to "suitability" of an insurance program, where the only substantial evidence of record demonstrated that said opinion was a reasonable one, although one upon which experts disagreed?

2. Is Due Process, or Equal Protection of the law denied by a judicial decision holding an insurance agent liable in fraud for a claimed false representation of his opinion as to "suitability" of an insurance program, where the evidence of falsity consisted of expert testimony based on demonstrable arithmetical mistakes and such expert testimony was contradicted by other qualified expert testimony to the effect that said opinion as to "suitability" was entirely reasonable?

3. Is Due Process, or Equal Protection of the law denied by the retroactive application of a judicial deci-

sion which, for the first time and contrary to prior law,

(a) imposes upon an insurance agent the liability of either a quasi-fiduciary, or a guarantor of "suitability," and

(b) imposes, besides heavy compensatory damages, exemplary and punitive damages, plus damages for mental anguish, contrary to prior law?

4. Whether the Court of Appeals committed error in holding an insurance agent to be either a "quasi-fiduciary or a guarantor of "suitability" of an insurance plan sold, thereby enunciating a novel and unanticipated rule of conduct for insurance agents, contrary to prior law, which inevitably will adversely affect the entire interstate insurance industry in the United States?

Statutes Involved.

U. S. Constitution

1. The Due Process Clauses of the Fifth and Fourteenth Amendments are sufficiently familiar to the Court not to require quotation.

2. Article I, §9: "No . . . *ex post facto* Law shall be passed." §10, cl. 1: "No State shall . . . pass any . . . *ex post facto* Law. . . ."

Statement of the Case.

At all times relevant to this controversy, Roger I. Knox, plaintiff and respondent, herein, was a citizen of Hawaii, and J. Leland Anderson, defendant and petitioner herein, was a citizen of the State of California. The amount in controversy was and is in excess of $10,000. Accordingly, the jurisdiction of the District

Court was invoked on grounds of diversity of citizenship, as authorized by 28 U. S. C. §1332.

References to the trial record will be in the form [00/00], the first number referring to the volume, the second to the page.

Whether petitioner life insurance salesman, should be deemed a fiduciary, or quasi-fiduciary, or guarantor of "suitability", to his prospect forms the core of this controversy.

The bank loan plan for the purchase of life insurance, and to whom it should be sold, was involved in this lawsuit. Basically, the plan enables an insured to increase his coverage by using the accumulated dividends and cash values on policies already owned as collateral for bank loans, which are in turn used to pay premiums on new policies. Additional loans are made annually to pay the renewal premiums as they accrue, but the new policies in the meanwhile, accumulate cash values and dividends of their own so that there is always more than sufficient collateral for the gradually increasing total loan. Should the insured die, the loans are repaid out of policy proceeds, the balance going to the beneficiaries [10 111-125]. Net insurance coverage (value of the policies less outstanding bank loans) always exceeds the gross coverage provided by the policies used to put the plan into effect. Although in the early years the excess coverage is very large, the out-of-pocket cost is relatively small, compared to other methods for buying insurance, since the only cash outlay is for interest to support the loans [see Pltf. Exs. 4, 8 and 10]. The interest feature gives rise to another advantage over the above initial low cost for greatly increased protection, in that interest is tax de-

ductible, whereas straight premium outlay is not (Int. Rev. Code of 1954, Sec. 163A). As the outstanding loan increases, interest cost rises correspondingly so that in the later years, the total cash outlay becomes substantial, but is offset in part by anticipated larger tax savings at a then higher income tax bracket.

Although plaintiff's experts testified adversely to the desirability of the plan in the instant case, defendant's expert witness, highly experienced in sales of financed insurance, expressed the opinion that the plan is particularly valuable for a person expecting constantly uptrending income—the "*young man on the way up*" [10/124-125]. It makes possible a huge coverage increase at negligible cash cost at a time when the insured is physically insurable and still young enough to take advantage of favorable premium rates (and, often, when he has a young family needing a large financial backstop). The cost differential is of course made up in the program's later years when the insured's income has risen [10/124] and his child support burden is lightened [see 10/103 to 11/223].

Defendant, J. Leland Anderson, an agent of the New York Life Insurance Co. (hereinafter referred to as "NYLIC"), has concentrated in recent years on selling financed insurance [29/1-9]. He is licensed to and has done business in many states, specifically in California, Utah, Idaho, Washington, Oregon, Nevada, Texas, Illinois, Michigan, Arizona, Missouri, New York, Massachusetts, Vermont, Washington, D. C. and formerly licensed in Hawaii. Because of the extensive geographical scope of his operations, he arranged with one Frank Kreidler, a resident agent in Hawaii, and others, to act as his local representatives [29/10-12]. Kreidler

was to contact prospects interested in purchasing bank-financed insurance. Anderson's staff was to make the final presentation [29/13-15; 4/72-76].

In August of 1952, with the help of E. E. Bodge, the then president of Von Hamm Young & Co., Kreidler was put in touch with Roger L. Knox [Plt. Ex. 1; 1/55]. Bodge stated he would only introduce Anderson or his associates to men of means. Anderson assumed Knox was in this category. At the time, Knox, a field superintendent of a major sugar plantation, was anticipating immediate promotion to the post of assistant manager [Knox Depo. p. 95; 4/19]. Knox had a large 5 bedroom home on 3 acres, a gardener, automobile and utilities furnished by the plantation, talked of building a beach home, thus, had the outward apparance of moderate wealth, allowing Anderson to believe he was a person of means and truly was "on the way up" [6/9, Knox Depo. pp. 40, 74-76, 29/26-27, 5/21, 4/98, 2/77]. He is described in the Court's Opinion as a "college graduate" (B.S., Stanford), a "professional biologist" and a "plantation executive" [see 2/74-82]. Knox then owned eight (8) different life insurance policies before meeting Kreidler or Anderson. Kreidler explained to Knox how the bank plan could enable him to double his insurance coverage (then at about $41,000) without a corresponding rise in annual cash outlay [Knox Depo. pp. 12-13]. Knox, interested, agreed to furnish the necessary preliminary information [1/65-67].

By November 6, 1952, all preparatory arrangements had been made. Knox had given certain information to Kreidler, furnished his policies [1/67], signed an application for new insurance [4/101], had taken and

passed the required physical examination [Knox Depo. p. 15]. His credit and financial capacity apparently had been checked by a credit investigative agency for NYLIC [4 103], the underwriters of NYLIC had found Knox to be insurable and had issued three policies ($100,000, $75,000 and $50,000) as proper amounts of coverage [29 23-24]. Anderson met Knox for the first time in early November, 1952 [2 97]. Defendant explained the operation of the plan to plaintiff, and expressed an opinion as to the suitability of the plan and Knox' ability to afford it [Finding 8(a)]. Knox, seemingly satisfied with the presentation, purchased a bank loan insurance program which embraced his existing insurance plus a new $100,000 policy on his own life [Finding 8(a)]. Arrangements were immediately made for effectuating the bank loan through an independent bank correspondent [3 87-90; 15 63], and for putting the new NYLIC policy in force [Knox Depo. p. 37; 1 100-115; Plff. Exs. 5, 6, 7].

The following May, Anderson again contacted Knox to inform him that the accumulated dividends and cash values of his then owned policies would support additional financed insurance [Knox Depo. pp. 38-40, 48-49; 1 119-112]. Knox thereupon purchased an additional $50,000 NYLIC policy, covering his wife's life, which policy was integrated into plaintiff's bank loan program [3 21; Conclusion of Law No. 2].

Sometime in August or September of 1953, the plantation on which Knox was employed changed managers [2 78]. Knox and his new superior immediately developed a marked hostility towards each other; there was, in Knox' words, a personality clash [2 79]. Knox' hopes for a promotion evaporated; his very job

in fact, was threatened [2 79; 32 84-88]. Certain friends of Knox who were insurance competitors of Anderson, and who could not sell the bank loan plan because their companies did not sell same, told Knox he had purchased a bad program. Believing he could no longer maintain the bank loan insurance program; he first reduced the program and later cancelled certain of the policies, sustaining losses in the process [2 23-31]. His complaint alleged defendant defrauded him, and sought compensatory, consequential exemplary and mental anguish damages. After a protracted trial, the Court below held Knox and Anderson to be in a confidential relationship [Conclusion of Law No. 1], and concluded Anderson was guilty of fraud by reason of various found misrepresentations [Finding No. 8] and nondisclosures [Finding No. 9]. Judgment was rendered against appellant for $13,309.98 compensatory damages, $2,500.00 damages for mental anguish, and $10,000.00 exemplary and punitive damages, or in all, $25,809.98 [Conclusions of Law Nos. 2, 3, and 4].

Following both the trial court's and Court of Appeal's decisions, there has been very extensive publicity in the press and especially in the life insurance industry in trade journals, special reports, seminars and bulletins from various insurance lawyers. The decision of the Court of Appeals in December 1961 was reported over radio newscasts in San Francisco, Los Angeles and elsewhere. The case is now known by name in the life insurance industry as a landmark decision.

How the Federal Question Was Raised.

1. Here, the Federal question was raised in petitioner's Petition for Rehearing, as follows (pp. 5-11, especially p. 9):

> "It is violative of Due Process for the Appellate Court to base its affirmance of the trial court on a ground that was not chiefly relied on by the trial court.
>
> "Where the court changes rules in midstream and there is no reasonable basis on which to anticipate the change, thus, no opportunity to adapt one's methods of selling, Anderson being caught by surprise by the change, it is a denial of Due Process." Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107 (1930) and cases cited therein."

2. In the circumstances, this was a timely raising of the Federal question, see page 11.

Reasons for Granting This Writ.

The judgment sought to be reviewed seemingly erects a very rigorous, novel and completely unexpected standard for life insurance agents to meet; such a decision has caught by surprise the petitioner, a very successful life insurance salesman, with a previously unblemished record, and has utterly ruined what was a prosperous and growing business. The decision has also surprised and alarmed a substantial number of persons in the life insurance industry. Proper supervision of the Federal judiciary demands that the lower court be set aright by this Court.

But more importantly, the writ should be granted because the questions involved have immediate importance far beyond the petitioner, Anderson. The petitioner stands in the shoes of each and every life insurance agent. This litigation is in effect a class action, the petitioner representing between 225,000 to 300,000 full time life insurance agents. The principles involved are tremendously important to the life insurance industry primarily, all other insurance agents in general, and possibly to other sales fields as well, since the novel question of whether the salesman is a fiduciary, a quasi-fiduciary, or in effect a guarantor of "suitability" touches, in principle, every sales field. The case is one of first impression. The question is unsettled now, indeed our search has revealed no other case quite like this one.

The far-reaching importance of this case, then, is seen by the following:

(1) that so very many individuals (between 225,000 and 300,000 insurance agents) are directly involved;

(2) the total life insurance protection in force on United States policyholders is $645,000,000,000;

(3) nearly two out of three Americans (118,000,000 persons) own life insurance; (Source: Life Insurance Fact Book of 1961, Institute of Life Insurance N. Y., N. Y.)

(4) There has been no other insurance case which has been so widely publicized and commented upon by spokesmen in the industry, their legal counsel and the press, possibly since 1944 when this Court ruled that the insurance business is inter-state commerce. *United States v. Southeastern Underwriters' Assn.*,

322 U. S. 533. (See a partial list of publications concerning the case, pp. 45-50.)

There is a pressing need for either this Court or the Congress to clarify and decide what standards should be required of these insurance agents.

We are advised by many executives in the insurance business, and their legal counsel, that if the writ is granted, many law firms representing the insurance industry will probably petition this Court to enter as *amicus curiae*.

As argued elsewhere, we submit there are several due process violations; before considering these, it is necessary to consider whether petitioners' claim of Federal right was timely made. We think it was.

Where the decision of the highest court of a State (territory) takes a litigant by surprise, introducing a factor theretofore unsuspected and unanticipated, it is sufficient for him then to raise the Federal question in his petition for rehearing, since in those circumstances that is his earliest opportunity to do so. *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673; *Missouri v. Gehner*, 281 U. S. 313, 320; *Herndon v. Georgia*, 295 U. S. 441, 443-444; *Saunders v. Shaw*, 244 U. S. 317.

"Surprise" here means, of course, not simply, "I never thought I'd lose this case," but rather, an unanticipated decision that has deprived the litigant of the opportunity earlier to assert a Federal claim. This element is present here.

I.

VIOLATIONS OF DUE PROCESS.

A. Is Due Process or Equal Protection of the Law Denied by a Judicial Decision Which Holds an Insurance Agent Liable for Fraud on the Basis of His Stated Opinion as to "Suitability" of an Insurance Program, Where the Only Substantial Evidence of Record Demonstrated That Said Opinion Was a Reasonable One, Although One Upon Which Experts Disagreed?

Federal due process is violated when a finding is made in the face of an utter lack of evidence, or a finding is made upon evidence which clearly does not support that finding.

Here, the expert witnesses produced at the trial disagreed on whether the program sold was "suitable". Plaintiff's witness, Van Cleve (who was an outspoken critic of the bank loan plan and admittedly had never sold a bank loan plan himself) said it was not suitable in his opinion [8/98-100]. Defendant's witness Stoessel (having had much experience with the bank loan plan) said it was "suitable" in his opinion, and in the opinion of other agents [10/119-123]. Witness Black prepared charts [Exs. 56-A through 56-B-1] and plaintiff's attorneys argued these charts showed it was "not suitable." Witness Bills also made charts [Exs. T and N] and defendant's attorneys argued this demonstrated "suitability". Where these expert insurance men disagreed, the trial court improperly accepted one side of the argument and concluded there was fraud in the other (Restatement, Contracts, Sec. 474). But witness Stoessel, with 36 years of insurance experience, a writer and lecturer on insurance, obviously a man of

integrity, surely was not lying when he said *he* thought the plan sold to Knox was "suitable." His honesty and integrity was not questioned.

If the evidence showed absolutely not the slightest possible basis on which any reasonable person could have made such a representation, then Anderson might be guilty of fraud—but a finding cannot be made of fraud, when some experts will support the opinion that it was a "suitable" program. It is then clearly and simply a matter of commercial opinion, as to which reasonable men might, and frequently and commonly do disagree.

There is not a shred of evidence in the record that Anderson made an actual false representation of *fact*. The Court of Appeals itself admitted it is a difficult question as to "whether the representation of "suitability" was in truth a representation of fact and not a mere expression of opinion." (Opinion, p. 5, Appendix B, p. 23). The only evidence in the record on this point is that Anderson gave *his opinion* that the program was "suitable".

So the Court of Appeals finally decided that his opinion of "suitability" was itself a fact, in order to find liability. How can this be? How can this be other than an *opinion*, where honest, reasonable men (the expert witnesses) in good faith entertain differing opinions, on a commercial matter? This is the actual core, or keystone of the entire litigation. There simply is not a shred of evidence in the record that Anderson made any representation as a false statement of *fact*, or that his opinion was not in good faith.

Therefore, this is a finding, or conclusion, of the Court made upon evidence which clearly does not sup-

port it, and as such, is a violation of Federal due process, *Thompson v. Louisville*, 362 U. S. 199; *Garner v. Louisiana*, 368 U. S. 157. See also *Northern Pac. R. Co. v. Department of Public Works*, 208 U. S. 39, 44-45: "An order based upon a finding made without evidence . . . or upon a finding made upon evidence which clearly does not support it . . . is an arbitrary act against which courst afford relief."

B. Retroactive Application of New Law and Surprise Resulting in Denial of Procedural Due Process Because of Ostensible Shift in Ground for Decision by Court of Appeals.

We submit that this case gives rise to several basic Constitutional problems: (1) The courts below have created a new standard of law making the insurance agent at the very least a guarantor or warrantor of the "suitability" of the insurance he sells, and at most imposing a fiduciary obligation upon the insurance agent, and then this new standard has been *retroactively* applied. (2) However, the Court of Appeals has purported to decide the case on traditional fraud principles, thus surprising the defendant, since the trial court's opinion was based on a theory of fiduciary obligation, and thus the defendant has been denied procedural due process.

(1) Retroactive Application of New Doctrine Is Unfair and Should Be Held to Deny Due Process.

Although the Court of Appeals stated that it assumed that no fiduciary relationship existed, and purported to decide the case on traditional fraud principles, in effect the opinion now places obligations on Anderson, and indeed all life insurance agents, closely akin to fiduciary

obligations—because now, after the fact, it is determined that Anderson should not have sold a program now found to be "unsuitable." Thus, whatever the verbal rationale, an insurance agent is in effect held to be a *guarantor* or *warrantor* of the "suitability" of insurance sold. Moreover, this "suitability" is not measured subjectively, as was done by Knox as purchaser, Anderson as salesman, and the New York Life Ins. Co. as issuer, but objectively, at a later time and place, apparently on the theory that "hindsight is better than foresight."

> "Persons contracting are presumed to know the existing law, but neither they nor their legal advisers are expected to know the law better than the courts, or to know what the law will be at some future day. Any principle or rule which deprives a person of property acquired by him, or the benefit of the contract entered into, in reliance upon and strict compliance with the law in all respects as interpreted and promulgated by the court of last resort, at the time of the transaction, and no fault can be imputed to him in the matter of the contract unless it be held a fault not to foresee and provide against future alterations in the construction of the law, must be radically wrong. Such a principle or rule of law would clog business transactions, unsettle titles, and destroy all confidence in the decisions of the Supreme Court of the state." *Farrior v. New England Security Mortgage Co.*, 92 Ala. 176, 12 L. R. A. 856. Accord: *Hill v. Atlantic & N.C.R.R.*, 55 S. E. 854 (N. C. 1906).

There are many cases holding that the law as stated by judicial decisions in force when a contract is made will be enforced—that overruling decisions will not be

retroactively applied. *Napier v. Jones*, 47 Ala. 90; *Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; *Hill v. Brown*, 144 N. C. 117, 56 S. E. 693 (1907); *Herndon v. Moore*, 18 S. C. 339.

In *Mutual Life Ins. Co. of N. Y. v. Bryant*, 177 S. W. 2d 588, 592-593 (Ky. 1943), a decision overruling a prior holding to the effect that recovery could be had on the disability clause of a non-occupational life insurance policy merely by showing that insured was unable to perform work in connection with his employment in which engaged at time of disability *was not given retroactive effect.* The dissent argued this non-retroactive approach applied only as to decisions overruling prior interpretations of a statute or constitution, but the majority felt that even when a mere judicial decision was overruled, the new rule should not be given retroactive, but only prospective effect. A similar view was taken in *World Fire & Marine Ins. Co. v. Tapp*, 279 Ky. 423, 130 S. W. 2d 848, 852 (1939).

One of the most important decisions denying retroactive application to an overruling decision is *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 50 Sup. Ct. 451, 74 L. Ed. 1107 (1930). This started as an equity action in Missouri court to enjoin assessment of a tax on the ground that the method of assessment was discriminatory in violation of Equal Protection. The trial court denied relief, and the Missouri Supreme Court, without passing on the merits, affirmed on the ground that plaintiff had failed to pursue the proper statutory remedy—appeal to State Tax Commission. It was now too late for plaintiff to do so. In reaching this result, the Missouri Supreme Court over-

ruled a prior decision which had held that the Commission had no power to grant relief in this type of case. Plaintiff filed a petition for rehearing, asserting that application of the new doctrine denied him due process, but the petition was denied. On certiorari this Court upheld the due process contention and reversed the decision below.

We submit that these cases should be followed, and that it is fundamentally unfair to retroactively apply a decision establishing a stricter standard of conduct for an insurance agent. It could be possible that insurance agents' standards should be improved, but this Court should not sanction the martyrdom of Anderson who has an unblemished past on the cross of the law's evolution. If it does, J. Leland Anderson will have been branded a thief. This is an indelible label. It will not wear off. It will wreck his career and perhaps his life. And all this despite the fact that petitioner undeniably conformed to the standards of conduct prevalent in the insurance industry both now and when this transaction was consummated. (See statement of Harold Franklin, president of AALU, p. 49.) For a compelling argument supporting the proposition that retroactive application of a new law violates due process, see Simpson, 38 Mich. L. Rev. 30, 47-49 (1939); *Muhlker v. N. Y. & Harlem R.R.*, 197 U. S. 544, 25 S. Ct. 522 (1905); *Gelpcke v. City of Dubuque*, 1 Wall. (68 U. S.) 175 (1863).

To be sure, the courts below have not *expressly* overruled any prior decisions, but they have done the same thing, in effect, by the simple expedient of declaring a new and higher standard governing insurance agents' relationships with their clients. The Court of Appeals in effect deemed Anderson, and thus life in-

surance agents in comparable fact situations, as a guarantor of the "suitability" of the insurance purchased. This is actually enunciating a novel doctrine, and then applying it retroactively. As stated in *Farrior v. New England Security Mortgage Co., supra*, neither Anderson nor his attorneys could be expected to foresee this development. Such a rule is grossly unfair, takes Anderson by complete surprise, will "clog business transactions" and "destroy all confidence in the decisions" of the courts, and further will cause a rash of new law suits in the insurance industry (there were at least three such suits against life insurance agents and insuring companies filed after this decision, pending in California, possible more now).

(2) By Analogy to Ex Post Facto Constitutional Provisions, Any Novel and Unexpected Change in the Law Relative to Fraud, Even in a Civil Case, Should Not Operate Retroactively.

Anderson's previous record is unblemished. Fraud is an extremely serious charge to make against any person, and the consequences to Anderson in terms of his public reputation and business success and church activities and standing are almost as serious in this civil fraud case as if he had been convicted of a crime. True, the prohibition against an *ex post facto* law technically applies only to criminal laws, *Calder v. Bull*, 3 Dall. (3 U. S.) 386 (1798), and statutes, not judicial decisions. *Ross v. Oregon*, 227 U. S. 150, 33 S. Ct. 220 (1913). But certainly the policy behind the *ex post facto* prohibition applies with almost equal force to a civil fraud case of this magnitude.

(3) Equal Protection.

We wonder how it is anything but a denial of equal protection of the laws to retroactively apply a novel and unprecedentedly rigid quasi-fiduciary standard to Anderson's detriment. Similar conduct by thousands of other insurance agents has not resulted in their judicial condemnation. Other agents now have at least been warned by this case of their possible liability as a guarantor of "suitability", but, without warning, Anderson is offered up as a sacrifice on the altar of quasi-fiduciary relationships.

C. The Defendant Has Been Surprised and It Is Unfair and a Denial of Due Process for the Court of Appeals to Depart From the Ground of Decision Used by the District Court and Apply a Different Ground to Affirm.

It is obvious that the District Court based its decision essentially upon its theory that a fiduciary relationship existed between Anderson and Knox. Finding of Fact No. 9, 162 Fed. Supp. at 341, refers to defendant's failure to disclose material information and facts "which defendant was under a duty to disclose to plaintiff *because of the relationship of trust and confidence* which existed between plaintiff and defendant. . . ." The Conclusions of Law expressly find a "*relationship of trust and confidence* . . . between plaintiff and defendant." (Emphasis added.)

Thus the principal ground for the trial court's decision was the claimed fiduciary relationship. It is now unfair to Anderson for the Court of Appeals to base its decision on what was not the main ground of decision by the District Court—this change of ground has completely surprised Anderson and his counsel, and if

the decision is now to be supported solely by reference to traditional fraud principles, the case should now be remanded to the District Court for a new trial upon this issue alone, free from the prejudicial effect of reliance upon a doctrine which the Appellate Court expressly says it assumes does not apply.

The trial court's reliance upon the rejected doctrine of "fiduciary relationship" so infected and tainted the trial proceedings that it was impossible for Anderson to receive a fair trial, thus he is entitled to a new trial, free of such polluting infection. How can the Court of Appeals know what decision the District Court might now reach if a new trial were held, based solely on the correct, traditional principles of common law fraud? It is by no means clear from the trial court's Findings of Fact that it even found the necessary facts upon which to base a conclusion of fraud, severed from its misdirected reliance upon fiduciary relationship. And it is crystal clear that the trial court's finding of fraud cannot be separated from its finding of a fiduciary relationship. This is obvious from an inspection of Conclusion of Law No. 1, in which "the relationship of trust and confidence" is specifically found, and in which the finding of fraud is not separated from the finding of a fiduciary relation, but appears to be tied in with it, inextricably meshed with it, and confused with it. In basic fairness to Anderson (and incidentally to the entire insurance industry), at the very least there should be a remand for a new trial based on surprise due to this change in the ground of decision.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930), illustrates the basic proposition that a court cannot

change rules in mid-stream without violating due process, where there is no reasonable basis upon which to anticipate the change. Thus in the instant case Anderson was caught by surprise by the radical shift in grounds for the decision. See also *Missouri v. Gehner*, 281 U. S. 313, 320; *Saunders v. Shaw*, 244 U. S. 317. On the general problem of denial of procedural due process by a shift in the grounds for decision by an appellate tribunal, see *Herndon v. Georgia*, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

D. Anderson Was Further Surprised Unfairly, When the Trial Court Erroneously Permitted Expert Testimony by Plaintiff's Witnesses That the Insurance Plan Was "Unsuitable," Since There Was a Good Faith Mistake Made in an Unnecessary and Unintended "Over-Borrowing" of $3,788.00; Such a Simple Arithmetical Mistake Distorted the Apparent Cost of the Insurance, Thus Showing It to Be Too Costly, and Therefore "Unsuitable."

1. Briefly, the first year's premium on Mrs. Knox' policy was mistakenly borrowed and paid twice. This over-borrowed amount was returned to and simply reposed in the bank correspondent's who was not Anderson's agent, nor ever directly or indirectly associated with his account, until Anderson's accountant, at the urging of plaintiff's attorneys, located it in a meticulous audit designed to determine why the cost and bank loan was so high [see record 12-98; 103, 107, 120; Exh. 15-A]. This was a simple arithmetical mistake in calculation by the bank correspondent with borrowings authorized by Knox without Anderson's knowledge, extremely unfortunate, but the uncontroverted evidence shows a good

faith mistake by this independent bank correspondent who was Knox' agent and not Anderson's agent [Record 12/98, 103, 107, 120; 13/116-17; 15/71-82; Opinion of Ninth Circuit, Appendix B, p. 68, footnote 46].

The unfairness is in the fact that testimony by the witnesses Van Cleve, Black and others, is now grossly inaccurate and distorted by the inclusion of this $3,788.00 over-borrowed amount, thus the cost is shown as too high. This was not discovered till the eve of trial, *after* plaintiff's charts and witnesses had been prepared for testimony, thus the Federal District Court was unfair in allowing any proof to be based upon the mistaken over-borrowing. Plaintiff's expert witnesses, testified the plan was "unsuitable", but such conclusion would be changed had the trial court stopped the testimony, and caused plaintiff to recompute figures to show correctly the workings of the plan, without that arithmetical mistake. Failing to do so, and the Appellate Court failing to recognize this, is simply unfair, and Anderson was deprived of an opportunity to rectify this, such violating due process of law in its primary sense.

(Note—The appellate court belatedly observed that, the sum, plus interest, now totalling $4,902.09, having been paid back, May 27, 1958 and release for same signed by Knox, should be credited on the judgment; see Ninth Circuit Order Denying Petition for Rehearing, dated Feb. 28, 1926, Appendix C.)

2. The Court's opinion on the suitability of the bank plan is grounded on several *fallacious* premises. If the writ is granted, many of these will be demonstrated in great detail. As an illustration of one fallacious, and misleading premise, which convinces us the Court

did not fully understand the workings of the bank loan plan, the Court anchored Knox to his 1951 income level (see Ninth Circuit Opinion, Appendix B, p. 42, footnote 18, computing that in 1960, the net interest [*i.e.* outlay for the insurance] would be 23% of his gross income) - - - then proceeded to compare against this income level the costs of the bank plan over a twenty year period. A proper comparison *necessarily* requires that *income* be projected on a twenty-year basis, the projection to be that of a reasonable man viewing the "whole" Roger Knox—his economic potentialities, physical and mental abilities—as they appeared at the time the program was sold. It was quite apparent that in 1951 Knox appeared to be a "young man on the way up." Hindsight has revealed he did not live up to his potentialities. However, a fair judgment in this case must set hindsight aside, and project bank plan costs against *prospective*, and not his *fixed income* as of 1951.

3. Finally, witness Black (for plaintiff) testified from some charts which are demonstrably fallacious. Space here does not permit demonstration now. This entails an accounting study, which we will provide by a C.P.A.—Attorney, if the writ is granted.

E. Damages.

1. In any event, the Court should have given Anderson credit against Knox' alleged losses for the value of the protection he enjoyed while the policies were in force, and other benefits accruing from conversion of the old policies to more favorable plans, and certain disability benefits for both Mr. and Mrs. Knox, as well as a waiver of premium clause. [159 Fed. Supp. at 806; Record

10/132-36]. Mr. and Mrs. Knox had $150,000 coverage for a year or more. This was worth a great deal. Knox received value from these items, and the damages must be recomputed to allow credit. Failure to do so is a deprivation of property without due process of law.

2. The award of $10,000 for exemplary and punitive damages is not proper as there was no finding of willful fraud. (See Clarence Moriss, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1187 n. 24 (1931).)

3. *Mental Anguish, Pain and Suffering:*

The $2,500.00 recovery for Knox' anxiety is supported by neither the facts of the case, nor the general law. Knox' worry was generated from his employment difficulties, and concern he would lose his job [Knox Depo. p. 39-40; 2 77-79, 32 84-88].

Judge Chambers, of the Court of Appeals, stated in his concurring opinion that "as to the element of damage for mental suffering, I cannot yet say I am satisfied with the American Law Institute's work in the field. Some day I may be. *Fraser v. Blue Cross Animal Hospital*, 39 Haw. 370, convinces me, in a diversity case, I should concur in the allowance for that item. In another case from another state, the question will have to be re-examined" (see Opinion of Ninth Circuit, Appendix B, p. 77).

The *Fraser* case is grossly distinguishable from the instant case, because in *Fraser* the plaintiff suffered

provable physical illness with a doctor bill, whereas here, Knox testified merely that he was worried and upset; it is based partly on Prosser's article in 37 Mich. L. Rev. 874, a close study of which demonstrates that damages for mental suffering have never been given, or even contemplated in the facts of the instant case. The Court plainly erred.

F. Reference to Anderson's Religion, and Biased Innuendo.

The trial judge described petitioner in his opinion, 459 Fed. Supp. 795, at 796, as ". . . SON OF A BEEkeeper, J. Leland Anderson, former *Mormon* missionary . . ." (emphasis added).

It is difficult to read this opinion and not be struck with the obvious bias and prejudice of the trial judge. This is forcefully demonstrated by the quoted portion above, where the innuendo and inference shows a clear departure from the expected objectivity customary from the Federal judiciary, where the writer descended into the gutter.

Petitioner's religious belief or affiliation was in no way involved in the dispute and was not relevant. Why was it even mentioned? Coupled with many, many biased, prejudiced and misleading statements elsewhere in that opinion, it is clear petitioner did not receive a fair trial by an impartial federal judge. This, in itself is a violation of due process of law.

II.

THE DECISIONS BELOW CONFLICT WITH HAWAIIAN LAW—THE COURT SIMPLY DID NOT FOLLOW HAWAIIAN LAW.

It is well settled, of course, that the Federal District Court must decide questions of state (or territorial) law in the same way that the state (or territorial) court would decide. Failure to do so constitutes a constitutional violation. The following shows that Hawaiian law was not followed by the courts below, as to the fiduciary or quasi-fiduciary or confidential relationships theory.

The Hawaiian cases are mostly noncommercial. Many involve children cheating their aged parents out of the old homestead—a type of fraud that seems to have institutionalized itself on the Islands. Probably the explanation lies in the educational gulf between parents and children. Legal business is conducted in English. The parents are of Oriental or Spanish descent, often unable to read or write English; the children educated in public schools. Parents naturally rely on their children, and have come to grief thereby. See *Texeira v. Texeira*, 40 Haw. 631 (1955); *Hee v. Chung*, 39 Haw. 304 (1952); *Furtado v. Rezents*, 33 Haw. 569 (1935); *Keanu v. Kamanoulu*, 20 Haw. 96 (1910); *cf. Notley v. Notley*, 23 Haw. 724 (1917) (parent cheating his children).

What commercial cases there are demonstrate little inclination to go beyond the rudimentary stages of confidential relationships. *Mehaula v. Houston*, 29 Haw. 304 (1926), pitted as adversaries an elderly Hawaiian lady, inexperienced both in business and the English language, against a husband and wife, one an ex-

perienced realtor, the other a schoolteacher. They were close neighbors, and the ladies intimate friends. Plaintiff signed a conveyance of her property on representations that it was merely a purchase option. Defendants' control over her mind, the complete absence of independent advice, the long and intimate friendship, and her complete reliance upon the defendants—all notably absent in *Knox v. Anderson*—were deemed sufficient grounds for finding a confidential relationship. *Hall v. Winam*, 14 Haw. 300 (1902), involved a minor and his closest friend and advisor, a vast discrepancy in experience, and the advisor's studied campaign to encourage the youth in debauchery in order to secure for himself a valuable lease. A confidential relationship was found. *Christley v. Magoon*, 13 Haw. 402 (1901), involved a 60 year-old simpleton and a party he had long relied upon for business advice. When defendant secured a conveyance of property from plaintiff on highly disadvantageous terms, it was properly set aside. The court emphasized the fact that plaintiff neither had independent advice, nor was it suggested that he procure same. Neither circumstance is present in our case.

Two cases in which the plaintiff's fiduciary arguments were rejected deserve mention. In *Kapaakea v. Morrison*, 2 Haw. 272 (1860), plaintiff charged that a fiduciary relationship existed because defendant's wife was plaintiff's agent and manager of his lands. The claim was rejected, though the court eventually held for plaintiff on grounds of actual fraud. More important is *Cummins v. Carter*, 17 Haw. 71 (1905). Acting on defendant's advice, plaintiff transferred property to his ex-wife under an alleged oral trust to reconvey.

Cummins claimed to be semi-illiterate, inexperienced in the ways of business, accustomed to relying upon Carter in all commercial matters, and without independent advice on the transaction in question—in short, the major components of a confidential relationship. The court did not explicitly discuss the confidential relations issue, but did hold plaintiff could *not* recover because (1) he should have taken steps to inform himself of the deed's contents; (2) he would not be protected because he was neither simple-minded nor illiterate.

When this body of law, the accumulation of over a century, is examined closely, the most striking factor is the complete absence of any commercial case even remotely resembling Knox v. Anderson. This, plus the elements that Hawaiian jurisprudence has deemed prerequisite to a confidential relationship—simple-mindedness, consanguinity, intimate friendship, absence of independent advice, domination, illiteracy, and implicit faith—indicate the Hawaiian Supreme Court would have come to a conclusion directly opposed to the instant decision. If a federal court is indeed like the state court across the street, a decision for defendant herein is indicated.

III.

CONFIDENTIAL OR FIDUCIARY RELATIONSHIP—THIS DECISION IS BASED ON THE ASSUMPTION OF A CONFIDENTIAL OR FIDUCIARY RELATIONSHIP.

The District Court's decision was based principally upon the conclusion that a fiduciary or confidential relationship existed between Anderson and Knox. Although the Court of Appeals purports to affirm the decision on the basis of the traditional law of fraud, it is obvious that they, too, are relying basically on the fiduciary principle. At the very least, the court in effect would make an insurance salesman a guarantor of the "suitability" of the insurance plan for the purchaser. A close reading of the court's opinion reveals that the court apparently believed that Anderson should have explained to Knox the most minute details of the insurance program. We do not argue that the discredited doctrine of *Caveat Emptor* should be revived. We realize its demise was well deserved. On the other hand, no previous case has come close to converting an insurance salesman into a guarantor of "suitability". Nor has previous law imposed upon the insurance salesman anything like the attorney-client relationship. The insurance agent is still a *salesman*; he is not his customer's *advisor*. If a radically more onerous standard is now to be imposed upon the insurance fraternity, the problem deserves far more study than it has thus far been given.

A. The Instant Case Is in Conflict With Decisions of Other Circuits, Commercial Cases in General, and Other Insurance Agent Cases.

(1) Conflict With Other Circuits.

Typical of the commercial cases is *Vargas v. Esquire, Inc.*, 166 F. 2d 651 (7th Cir. 1948), in which plaintiff sued to rescind an employment contract allegedly obtained in violation of a confidential relationship. Plaintiff was a noted commercial artist; defendant a famous magazine. Plaintiff and defendant's president, David Smart, were close friends. Smart had made large personal loans to plaintiff over a long period of time; had performed many nonpecuniary favors for him; and plaintiff, an alien without business experience, had relied implicitly on Smart to handle his affairs with Esquire Magazine. The trial court found a confidential relation, characterizing Smart as Vargas' "financial guardian angel". Reversing, the Seventh Circuit held (a) that belief in the honesty and integrity of a close and intimate friend, or the existence of an employer-employee relationship, or trust alone, is insufficient to establish a confidential relation, and (b) that absent intentional fraud, a man who signs a contract while in possession of all his faculties cannot relieve himself of its obligations by saying that he didn't read it, or didn't understand what it contained.

> "The law requires men, in their dealings with each other, to exercise proper vigilance and give their attention to those particulars which may be supposed to be within reach of their observation and judgment and not to close their eyes to the means of information which are accessible to them." *Id.* at 654.

This language is directly applicable to the instant case. Knox, a man who by education and business attainment obviously possessed considerable powers of observation and judgment, testified that he relied implicitly on Anderson to tell him whether or not he (Knox) could afford the program [3 83]. Is not what Knox could afford properly within the "reach of his own observation and judgment"?

Another relevant case is *Wick v. Keshner*, 244 F. 2d 146 (8th Cir. 1957). When his investment in cattle turned sour, plaintiff, president of a pipe organ manufacturing firm, sought to hold defendant cattle vendor liable on the theory of superior knowledge and implicit trust. Emphasizing that defendant was a competent, experienced businessman, even though not a cattle expert, the court denied recovery. In an important business transaction, he who knows the ways of commerce is under a duty to investigate, to probe, not absorb unquestionably every remark made by a salesman. *As between salesman and prospect, where both are commercially knowledgeable, no confidential relationship exists;* the law saves its protection for the unwittingly credulous or incompetent.

Other elements akin to Knox v. Anderson's situation are found in *Hyman v. Regenstein*, 258 F. 2d 502 (5th Cir. 1958). Hyman, a talented chemist, sought to establish a confidential relationship by characterizing himself as the "inventor" enmeshed in the toils of the "unscrupulous businessman." Because of his wide commercial background, the court properly rejected the contention that he was living in an "inventor's dream world." The same may be said of plaintiff Knox, whose claim to be living in a "biologist's dream world" is

belied by his history of executive and managerial experience, and his prior experience with and ownership of insurance.

An insurance case which we quote elsewhere, *Rishel v. Pacific Life Ins. Co.*, 78 F. 2d 881 (10th Cir. 1935), flatly rejected the fiduciary theory.

(2) Conflict With Commercial Cases in General.

The principle here applicable is well illustrated by *Boettcher v. Goethe*, 165 Neb. 363, 85 N. W. 2d 884 (1957). Plaintiff sued for damages, alleging fraud and violation of a confidential relation in inducing him to enter into a complex contract for the purchase of stock in defendant's corporation. Plaintiff had known defendant casually for some years, was impressed with him, and had dealt with him in one prior stock transaction. Denying relief, the court stated:

> "The term confidential relation has a comprehensive meaning and it may vary in reference to particular relationships . . . but it has not been construed to include the relationship of vendor and vendee merely because the parties had known each other for a limited time and both parties were favorably impressed with the other." 165 Neb. at 378, 85 N. W. 2d at 892-893.

This case is illustrative of the general principle that the doctrine of confidential relationships has never been employed as a prerequisite to imposing fraud liability in connection with ordinary commercial sales. Tho this generality is probably unprovable, except by negative support, (see Vol. 33, Sixth Decennial Digest, Descriptive Word Index, "Fiduciary & Confidential Relations", at 852 (1958), where one will search in vain for a

reference to sales law), extensive reading of the case law will bear witness to its truth. *E.g., Rosenquist v. Baker*, 227 Minn. 217, 35 N. W. 2d 346 (1948) (plaintiff-buyer, a trusting soul, was mercilessly bilked by defendant-seller, but court never considered confidential relationships).

Gonsalves v. Hodgson, 38 Cal. 2d 91, 237 P. 2d 650 (1951), illustrates a situation somewhat parallel to the instant case in that the basis of the claimed confidential relation was defendant's expertise. Defendant was a ship builder who contracted to build a vessel to plaintiff's specifications. Plaintiff, suing for damages, contended that the specialized nature of the work, plus the fact that this was an extraordinary business transaction, resulted in a fiduciary obligation upon defendant to do the work properly. The court rejected this claim, holding that *confidential relationships do not arise as a result of contractual duties.*

Every court that has ever discussed confidential relationship at length has stated that the minimal prerequisite is that confidence be in fact reposed. Bogert, Trusts §482 (1946). See *Grenier v. Harley*, 250 F. 2d 539 (9th Cir. 1957); *Security Trust Co. v. Wilson*, 307 Ky. 152, 210 S. W. 2d 336 (1948). Knox testified that he thought Anderson a fast talking super-salesman, and that he had many attitudes of fright, doubt, concern and disappointment [Knox Depo. pp. 18, 20, 22, 24-25, 30, 33, 35, 36, 46, 47, 82, 103, 104-105; 1-81, 84, 86; 3-82]. These are hardly the feelings of a man reposing implicit trust in another. In fact, the normal reaction on the part of a college graduate with business experience, such as Knox, to a determined salesman's pitch is stiffened sales resistance—skepticism —not childlike gullibility.

However, assuming *arguendo* that Knox in fact did repose trust and confidence in Anderson to the extent claimed, he still has not made out his case. "The fact that it is alleged that the plaintiff reposed trust and confidence in the defendants . . . does not create a confidential relationship. In the majority of business dealings, opposite parties have trust and confidence in each other's integrity, but there is no confidential relationship by this alone." *Dozier v. Burns*, 186 Ga. 19, 26, 196 S. E. 785, 789 (1938). "There must be more than mere confidence in another's honesty and integrity to sustain the presumption of constructive fraud." *Fowler v. Associated Oil Co.*, 74 P. 2d 727, 728 (Cal. 1938). To same effect, see *Hancock v. Anderson*, 160 Va. 225, 168 S. E. 458 (1933); *Hood v. Cline*, 35 Wash. 2d 192, 212 P. 2d 110 (1949); 3 Bogert, Trusts 244-245 (1946).

Prior reliance by plaintiff on defendant is sometimes said to satisfy this "extra something" requirement. Bogert, *supra* at 245-246. Never having met Anderson before this sale, Knox obviously never relied upon him. In other words, the confidential relationship cannot arise "contemporaneously" with the transaction. Bogert, *supra* at 245-246.

In commercial cases, the "plus" factor insisted on in the cases is that, *at the very least*, there be some relationship *independent* of the commercial transaction in question. "There must be something in the particular circumstances which approximates a business agency, a professional relationship or a family tie, something which impels or induces the trusting party to relax the care and vigilance, which he otherwise should and ordinarily would, maintain." *Collins v. Nelson*, 193 Wash.

334, 345, 75 P. 2d 570, 574 (1938). The trial court apparently made a feeble effort to satisfy this requirement by noting the existence of a pervasive spirit of friendliness and trust among the residents of Maui which extended to Anderson because "he came in the business fellowship of Island insurance people." 159 Fed. Supp. at 798. In this tropical paradise, it may be dubious wisdom to repose complete confidence in a local insurance agent, but to rely implicitly on any insurance man from anywhere is ridiculous. Such a rule would impose on a stranger from without the gates the supposed morals of the community within, rather than the general standards of the marketplace. It is indeed novel law that mere goodwill among neighbors can create a relationship independent of the commercial transaction involved. See Note, 97 Pa. L. Rev. 712, 719-720 (1949). If it does, however, we merely note that Anderson and Knox were not neighbors.

Many courts have held that intimate friendships of many years standing are insufficient by themselves to support a confidential relationship. See, *e.g.*, *Jackson v. Gorham*, 98 Cal. App. 112, 276 Pac. 391 (1929); *Willard v. Integrity Trust Co.*, 273 Pa. 24, 28, 116 Atl. 513, 514 (1922). At the time the first policy was sold (the crucial period of the alleged fraud), Knox and Anderson had known each other casually for less than 24 hours. Indeed, even close family relationships are usually held not a sufficient base *per se* to establish a confidential relationship. *Messick v. Pennell*, 182 Md. 531, 35 A. 2d 143 (1943) (father-daughter); *In re Stromina's Will*, 12 N. J. Super. 217, 79 A. 2d 492 (1951) (mother-son); *Noel v. Noel*, 225 Ala. 302, 143 So. 469 (1932) (brother-sister); Knox and Anderson are, of course, not even remotely related.

(3) Conflict With Other Insurance Agent Cases.

As in commercial cases generally, the courts are decidedly adverse to imposing fiduciary standards on sales negotiations in the insurance industry. Possibly the best statement of the rationale underlying these cases, and one explicitly applicable to the case at bar, was enunciated in *Rishel v. Pacific Life Ins. Co.*, 78 F. 2d 881 (10th Cir. 1935), an action to recover premiums paid on annuity contracts. Rejecting plaintiff's allegations, the court stated:

> "(A)n insurance agent does not stand in the relationship to his customer that a lawyer does to his client or a father to his son. . . . The law does not cast on insurance companies the affirmative burdens cast upon trustees who deal with the property of their cestuis. . . . (T)he fact that a seller of horses or automobiles knows more about them than the buyer does not make the seller a quasi-trustee for the buyer. If that were the law, there could be no arms-length bargaining except between those of identically the same knowledge and experience." *Id.* at 886.

The same principle was recently restated in *Sackett v. Penn. Mut. Life Ins. Co.*, 82 R. I. 172, 106 A. 2d 741 (1954). The suit was also for rescission of an annuity contract; the charge also violation of a confidential relationship. The purchaser, Mrs. Susan Butler, was completely lacking in commercial acumen, and at the time of contracting was 66 years old, illiterate, and extremely ill. The court held the pleadings to be too general, and stated that "ordinarily, an insurance company stands in no fiduciary relation to a legally competent applicant for an annuity or other insurance con-

tract"—a description which applies much better to Mr. Knox than it did to Mrs. Butler. *Accord: Hart v. Waldo*, 117 Ga. 500, 507-08, 43 S. E. 998, 1000 (1903): "Those who are so unfortunate, either from bad health or lack of experience, as to be ignorant of business affairs, should rely for advice in such matters upon their known friends, and not upon those who represent conflicting business interests, even though there be every reason to believe that such opposite party in interest is 'a perfect gentleman and an honest man.'"

Probably the most interesting of the recent decisions, *Meyer's Executor v. Huber*, 280 S. W. 2d 157 (Ky. 1955), involved two little old ladies. Mrs. Huber, 82, was, of all things, an insurance agent. She sold Mrs. Meyer, her intimate friend, an annuity on which Mrs. Meyer could break even only if she lived for at least 14 years. Mrs. Meyer was in her seventies and critically ill. Her life expectancy, actuarially, was a maximum six years. She lasted only 5 months. Her executor, charging both fraud and violation of a confidential relationship, sued for rescission. The court flatly rejected both claims. Accord, *Hult v. Home Life Ins. Co.*, 213 Iowa 890, 240 N. W. 218 (1932). Certainly if this close companionship of the aged was not confidential, it seems impossible to so denominate the Knox-Anderson relationship.

Northern Assur. Co. v. Meyer, 194 Mich. 371, 160 N. W. 617 (1916), in part factually parallels our case. Insureds, claiming fraud by the insurance salesman, were both young men, literate, with a reasonable amount of business experience. The court refused to find a confidential relationship, and held insured bound by the contracts they had signed whether they had understood

them or not. Absent illiteracy, a mental defect or complete naivete in commercial transactions, courts will not relieve parties of obligations simply because of "buyer's remorse." More important, the law will not impose fiduciary strictures where the plaintiff lacks a valid reason for expecting the other party to treat him as a *cestui que trust*. *Accord; Boykin v. Franklin Life Ins. Co.*, 14 Ga. App. 666, 82 S. E. 60 (1914) (client and agent who had been close friends for eight to ter years, as well as members of the same fraternal order, not in a confidential relationship, although court conceded client had relied completely on the agent).

There are occasional cases holding insurance agents liable for constructive fraud via the legal bridge of confidential relations. However, the leading jurisdiction in this movement, laid down prerequisites for a confidential relationship which clearly would *not* establish Anderson's liability. *Stark v. Equitable Life Assur. Soc.*, 205 Minn. 138, 285 N. W. 466 (1939). Neither Stark's long acquaintance with the Equitable agent, nor his implicit confidence in him, were deemed sufficient to establish a confidential relation. The crucial factor—and the one completely missing from the instant litigation—was the insurance company's vigorous recommendation to its clients that they avoid consulting an attorney and rely entirely on the local Equitable agent for assistance and counsel. The relationship was thereby converted from an ordinary salesman-customer one to a fiduciary one. *Accord, Fawcett v. Sun Life Assur. Co.*, 135 F. 2d 544 (10th Cir. 1943) (where agent misrepresented the law, *and* actively dissuaded plaintiff from consulting an attorney, there is an exception to the general rule that insurer and insured are not confidentially related).

Not only did Anderson not dissuade Knox from consulting advisors (other than competing insurance agents), he urged him to do so [2 106; 32 60; 32 71]. This is the clearest fact in the entire record; all witnesses, including Mr. and Mrs. Knox, agree, without contradiction. *Anderson told Knox to consult his own tax man and attorney before he purchased the plan.*

B. The Bank Loan Insurance Plan Should Not Be Condemned by the Courts.

A good part of this litigation has been devoted to trying not Anderson but the bank loan plan. Plaintiff's counsel put the program on the stand, labeled it a monster, brought in the opposition to support his allegation, and convicted it in the mind of the trial court. It was then sentenced to death, via the fiduciary standards route. The Court of Appeals likewise was quite obviously influenced in its decision by its strong aversion to the bank loan plan. This is evidenced by the court's comments at 297 F. 2d at 721-24, and in footnotes 40-42. In footnote 41 the court quoted from a speech by an insurance executive in which many allegedly dubious features of the plan are emphasized—the possibility of a change in the federal tax law on interest deductions, the bank might raise its interest rates, the insured must allegedly remain in a top tax bracket for many years, etc. The speaker stated that "The sale and purchase motives in these cases are . . . primarily motives of self-interest—self-interest of the agent to earn a commission and self-interest of the purchaser to gain something for nothing."

The court apparently sympathized with these anti-bank loan-plan views; the result would seem to follow inevit

ably. It is true that many insurance agents are markedly hostile to bank loan insurance. We submit, however, that so long as respectable companies are willing to issue such policies, the courts have no business taking sides in such internecine warfare. Nor have they any business deciding cases on the basis of antipathy towards a perfectly legal insurance tool. Courts are not best equipped properly to weigh the merits of technical insurance plans, having as their only guide the testimony of interested witnesses on both sides; rather legislative or administrative inquiry would be preferable.

The wisdom of the bank loan plan is surely a matter of judgment or opinion on which reasonable and honest men might differ. It is ideally suited for a fairly young individual, particularly one with small children, employed in a position where rapid advancement and rising income can be expected, and who desires substantially more insurance protection than he is presently carrying. It is tailored to catch the "young man on the way up" when he is still insurable at relatively low rates. It enables him to greatly expand his coverage—and thereby adequately protect his family—at a relatively small cash outlay in the program's early years. As his earning capacity swells, he pays out the large amounts he can then afford and obtains correspondingly larger tax savings, because tax brackets increase automatically with rising income. Roger Knox was this type of man. He was 36—an age when many business figures are poised on the brink of a spectacular career. He was apparently

marked for promotion as an executive in a large corporation. In fact, he told Anderson he was about to be promoted.

If the bank loan plan could not be sold to Knox in these circumstances, which is what the court in effect holds, then no insurance agent is safe in selling a similar bank loan plan to any similarly situated rising young executive. To be sure, the particular facts of any case will always vary to some degree, but Knox's situation is fundamentally paralleled in tens of thousands of cases. What the court in effect says is that the bank loan plan can be sold only to a wealthy person who is already "arrived"—the very person who, in most cases, has less need for it than the "young man on the way up". The court has no business making such a decision; it should be left to the individual insured or, if the public is greatly concerned, to the Legislature.

The lower courts strongly relied on Van Cleve's testimony.* Van Cleve looks to the plan's termination date and believes that the coverage *at that time* does not correspond favorably to prior cash outlays and immediately brands this a "bad plan". What he overlooks is that under a bank plan, with its initally high, but gradually descending coverage feature, the purchaser, (Knox) consumes protection, consumes it gradually but steadily. Insurance protection is like food. It is a consumable commodity. One buys food, eats it, and it's gone. The householder who purchased food for many years, and then sued the grocer because he had nothing left, would

be laughed out of court. Knox purchased many years of protection, but since he would not have it all left upon termination, Van Cleve says Knox is justified in suing the salesman. Unfortunately, no one is laughing.

Moreover, contrary to the lower courts' assumption, 40% is *not* the minimum tax bracket in which the bank loan plan works.

There is a tax saving in *any* bracket; only the amount of the savings is affected by the bracket level. To the extent interest is deductible in determining taxable income, there must be a tax savings. This can and will be arithmetically and forcefully demonstrated, if the writ is granted, by a C.P.A.-attorney who has prepared a chart to easily demonstrate a tax saving in *any* tax bracket. Failure to understand this goes to the core of the problem. In the opinion of Van Cleve, a bank plan is useless if the purchaser's tax bracket is not so high that his insurance protection costs him nothing. See Van Cleve, *The Bank Loan Plan: One Point of View*, J. Am. Soc. C. L. U. 167, 169 (1950). What this "something for nothing" approach ignores is that there are still substantial savings in bank financed insurance even for a low bracket taxpayer.

Anyway, Knox did not testify he believed he was in a 40% bracket and, relying, bought the program. He said the discussion of the 40% bracket made no impression on him at all—"I didn't give it a thought" [Knox Depo. pp. 26-27, 28-29, 68-69, 88].

IV.

PUBLIC IMPORTANCE AND IMPACT OF THIS CASE ON INSURANCE INDUSTRY.

We recognize that a problem in this case is persuading this Court that an insurance fraud case is deserving of the exercise of the discretionary writ of certiorari. We contend that *this* insurance fraud case is of such public importance in its implications for the entire insurance industry that it does deserve to be reviewed by this Court.

This case's imposition upon insurance agents of the onerous and totally unexpected burden of a guarantor of the "suitability" of insurance has caused grave concern and apprehension among insurance people. The obligations of a guarantor of "suitability" are so novel and so drastically more exacting than any heretofore prevailing that this case's repercussions are resounding throughout the insurance industry. The plain fact is that petitioner's conduct in selling the bank plan to respondent does not differ substantially from the conduct of most life insurance agents in their daily business life. By denominating such conduct fraud, the courts below have in effect declared that the standard selling practices of the insurance fraternity are inherently fraudulent. Insurance agents everywhere are apprehensive, for at least three similar suits have been filed in California since this case and others will inevitably follow, for no salesman satisfies all his clients, and this case, as it now stands, offers the disgruntled

policy holder a legal rationale for a lawsuit anytime he concludes he made a bad bargain.

Certainly insurance is interstate commerce. *United States v. South-Eastern Underwriters' Ass'n*, 332 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944); *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342 (1946). Obviously, any decision that requires insurance agents to live up to such a radically novel and stringent standard has a substantial impact upon interstate commerce. It would be hard to find any interstate activity with a greater role in our national economy than insurance. As of 1960 life insurance policy holders had a total protection of $645,000,000,000; American families received in 1960 payments of $8,000,000,000 in both life policies and annuities; life insurance companies had total assets of $120,000,000,000; 118,000,000 Americans owned life insurance. It would seem from this data that if the insurance agent-insurance prospect relationship is to be judicially analogized to the attorney-client relationship that this is a matter of such public importance that the decision should be made by our highest court, or the United States Congress.

The great concern of, and impact upon the insurance industry can be seen from the very extensive publicity given this case in the industry in the form of speeches by executives and their general legal counsel, seminars and radio news announcements following the Court of Appeals decision.

The Convention of Life Underwriters, in Los Angeles, California devoted considerable time to an exhaustive analysis of the case.

A 34 page analysis of the Court of Appeals' opinion was prepared in a special bulletin for the Association

for Advanced Life Underwriters (AALU), by their attorneys and circulated to all members of that organization, dated December 18, 1961.

A few magazines and periodicals have come to our attention, but no systematic search was made for same. There undoubtedly are more articles in existence. The following partial list illustrates the deep concern of the industry and some legal writers:

Exhibits.

1. *News Release*—mailed out to insurance agents and others by the Security Life Insurance Co., in 1958.

2. *Magazine Article*—The Insurance Law Journal, C.C.H., May 1958.

3. *Special Report*—Occidental Life Insurance Co., of America, July 11, 1958, No. 29, two pages, from Legal Bulletin, Vol. 78, No. 6, June 1958.

4. *Magazine Article*—Probe Magazine, Life Insurance News, N. Y., Vol. 5, No. 14, July 7, 1958.

> "*predicts that . . . many similar suits will be forthcoming,*" resulting in bad publicity for the insurance business.

5. *Newspaper Article*—Los Angeles Daily Journal (the daily legal newspaper in Los Angeles), title: "Case of First Impression—LIFE INSURANCE AGENT LIABLE AS FIDUCIARY TO HIS CLIENT", July 14, 1958.

This writer states that:

> "*the significance of the decision is . . . . highlighted by the fact that plaintiff was evidently not a person likely to be easily deceived or misled*"

. . .

"In view of the potentially great impact which the decision may have upon sales practices, particularly in the insurance industry, the ultimate disposition of the case is being awaited with considerable interest."

6. *Legal Article*—Legal Duties and Liabilities of the Life Insurance Agent, May 25, 1959, by Allen M. Steele, General Counsel, Life and Casualty Insurance Company of Tennessee, Nashville, Tennessee.

The case is discussed and analyzed at page 441 and following:

The writer says: "(The case) has been accentuated by the attention given in the insurance press to an action filed in the Federal District Court of Northern California within the past few months against three of the larger companies based on alleged fraud and false representations of two agents representing the companies, the agents having been made third party defendants by one of the companies."

7. *Magazine Article*—Western Underwriter, article by C. M. Dunaway, General Counsel, National Association of Life Underwriters, (NALU), May, 1961, titled:

"Should the Agent be Liable?"

(based on a speech given February 1961, Saratoga Springs, N. Y. at a meeting of the NALU for New York State).

8. *Magazine Article*—Western Underwriter, July 1961,

(a correction of the May 1961 article), stating that the Anderson v. Knox case shows "an ex-

ample of the high standards of conduct and duty the Courts will probably require."

9. *Magazine Article*—Best's Insurance News, July, 1961.

10. *Newspaper Article*—San Jose Mercury, Dec. 5, 1961.

11. *Newspaper Article*—San Francisco Chronicle, Dec. 5, 1961, headlined

"Ruling to Curb Insurance Tactics."

12. *Newspaper Article*—Underwriters' Report, Dec. 7, 1961.

13. *Newspaper Article*—The National Underwriter (The leading national weekly newspaper of life insurance), Dec. 9, 1961, headlined:

"Federal Appeals Court Specifically By-passes Fiduciary Duty Question."

14. *Newspaper Article*—The National Underwriter, Dec. 16, 1961, two pages.

in which the writer noted that the Appellate Court did not pass on "the question of the fiduciary relationship that the trial judge indicated existed between the buyer and seller."

15. *Newspaper Editorial*—The National Underwriter, Dec. 16, 1961, entitled: "How Much 'Suitability' Must There Be?" The writer asks what can be expected to follow the affirmance of the case by the Appellate Court and then comments:

". . . the appeals Court seems to have gone pretty far in specifying standards for agents to follow in their selling representations. . . ."

It's no defense that the agent didn't know whether the policy was suitable or not. . . . How far can this principle of suitability be carried by plaintiff's lawyers . . . ?"

[He then suggests a case where a young prospect is sold a substantial policy, later becomes uninsurable and because of his future family situation needed more insurance, then sues the agent because the plan was "unsuitable" in that he does not now have enough insurance.]

". . . the doctrine of holding the agent responsible for the 'suitability' of his recommendations can have some far-reaching effects"

". . . (This case) could well invite a lot of future litigation that otherwise nobody would ever have thought of initiating . . . a great many (law suits) will be from policyholders who have no real reason to complain but who still feel they were the victims of poor advice. Unfortunately, the people who will pass on these claims will be judges and lawyers and not insurance experts." (The writer then commented on the fact that Vice-president W. Douglas Bell, attorney, discussed the case at a meeting in Dec. 1961 of the Assn. of Life Insurance Counsel).

16. *Magazine Article*—Insurance Advocate, Dec. 16, 1961.

17. *Magazine Article*—Insurance Advocate, Dec. 23, 1961, entitled: "Knox-Anderson Spawn for more suits?"

"The safest judgment that could be made concerning Anderson v. Knox is that it will spawn

many additional suits instituted by disgruntled and aggrieved insureds",

quoting general legal counsel for an association of insurance agents.

The article concludes:

"Therefore, it can be expected that the decision will generate additional litigation."

18. *Newspaper Article*—The National Underwriter, Dec. 30, 1961, entitled: "Knox-Anderson Case May Cause Many Suits Against Life Agents."

"(The case) will serve as an excellent midwife for suits against agents. . . . It can be expected that nuisance suits will be brought—those suits in which the plaintiff expects to settle at whatever price the defendant life insurance agent will pay in order to avoid the trouble and notoriety of a trial."

19. *Magazine Article*—Life Association News, Feb. 1962, by Carlyle M. Dunaway, NALU General Counsel.

20. *Newspaper Article*—The National Underwriter, Feb. 10, 1962, entitled: "Knox Anderson Decision Called Threat to Established Practices."

"Harold Franklin, of Cleveland, Ohio, President of Association for Advanced Life Underwriting, criticized Knox Anderson case on the ground that it appears to denounce practices long accepted in the life insurance industry, in a talk at a recent seminar in Los Angeles."

He said: ". . . the more I studied the case, the more I began to differ with the court's find

ings and the court's implied denunciations of practices which have long been accepted in our industry. Like everyone else, I wonder where this is going to lead."

21. *Newspaper Article*—The National Underwriter, Feb. 17, 1962. It was mentioned among other things that the case would be appealed to the U. S. Supreme Court, if rehearing denied.

22. *Newspaper Article*—The National Underwriter, Mar. 17, 1962. The denial of rehearing by the U. S. Court of Appeals was mentioned.

The case has also been noted in at least two (2) law reviews:

1—6 U.C.L.A. L. Rev. 170 (1959).

2—43 Minn. L. Rev. 1001 (1959).

There is currently another law review article in preparation at the University of Illinois Law School, so we have been informed.

Conclusion.

Facts are stubborn things. Here are some of the facts.

Hard cases, we are told, make bad law. This may be true also of cases which are complex, or which present issues of potentially far reaching consequences. This is such a case. The ideal emblazoned on the edifice which houses the Supreme Court of the United States —"Equal Justice Under Law"—presupposes that Judges of intelligence and dedication will render informed judgments. This case calls for the highest qualities of both intelligence and dedication, that justice might not fail.

We sincerely believe the Constitution of the United States is an inspired document, that wise and honest men were specially raised up by the Almighty to draft that divine document. We sincerely believe that wise and honest men have likewise been raised up and now sit to interpret and enforce the Constitution and to guarantee our sacred freedoms. We humbly pray that, not only on behalf of petitioner, but the 225,000 to 300,000 insurance agents for whom this petition speaks, and in elemental fairness and justice; this Court will grant the writ of certiorari.

IVAN E. LAWRENCE,
Counsel for Petitioner.

APPENDIX "A."

Opinion of the United States District Court for the District of Hawaii.

Roger L. Knox, Plaintiff, v. J. Leland Anderson, Defendant. Civil No. 1382.

J. Frank McLaughlin, Judge.

Filed February 17, 1958.

Is the purchase of $150,000 of life insurance a "do-it-yourself" project?

In 1952 Roger L. Knox, 38, a professional biologist and graduate of Stanford University, lived with his wife Ellen and their three young children on the "Valley Isle" of Maui, seventy miles from metropolitan Honolulu. Maui, with its volcanic soil, is a sugar producing island of the Hawaiian group. Knox was employed on one of the sugar plantations as a field superintendent. He was in 1952 earning a salary of $8,100 a year and had an income of approximately $1,500 from investments. Like other plantation executives Knox and his family lived in a rent-free company house, had a gardener furnished him to care for its surrounding two acres, and was supplied with the use of a company automobile. His position in plantation society seemed economically secure. Knox looked forward hopefully to the day when he would be promoted to assistant manager of his plantation at a salary of $12,000 a year.

Son of a bookkeeper, J. Leland Anderson, former Mormon missionary and once a Real Silk salesman, had been in the insurance business for 25 years principally

in the Los Angeles area where he resides. His specialty was selling bank financed insurance. In the past eight years he had "delivered" twenty-five million dollars of insurance so financed. When his wife persuaded him to take a vacation, their visit to the Hawaiian Islands proved little solace to him. The fabled charms of Polynesia left his one great desire unaffected. He wished only to sell more insurance. While other vacationers lolled and enjoyed the sun Anderson investigated the area for contacts. He became convinced that Hawaii could use his service of bank financed insurance. To this end Anderson returned to the Islands after his vacation, and in 1952 established an office in Honolulu, which was essentially the same in organization as the one he maintained in Los Angeles. The basic ingredients were Anderson's abilities as a salesman and the bank connections of his associate, William Van de Carr, which enabled loans to be put through once Anderson had sold the program.

Bank financed insurance is not a revoluntary concept. The method prescribes a bank loan. Instead of the loan being paid to the borrower it is utilized by the bank to pay his insurance premiums as they become due. Under the present tax law the interest paid to the bank on the loan is deductible for income tax purposes, and the saving thus incurred can be used to purchase additional insurance coverage if desired. The amount of this saving depends on the tax bracket of the insured. Below the 40% bracket his savings would be negligible and below 30% non-existent. When Anderson applied to the Insurance Commissioner for a license to sell bank financed insurance in Hawaii he was warned about selling procedures, especially where the client was a family man on a fixed income.

In the field Anderson had his bird dogs. The function of a bird dog to a large extent is implied by the name itself. He precedes the agent into the field, searches for information on prospects, and holds their interests at bay until the principal agent can arrive and consummate the sale. In approaching a prospect, Anderson instructed Frank Kreidler, his number one bird dog:

> "* * * [K]eep them in anticipation of meeting me, explaining to them that I will be able to give them all the information they desire * * *
>
> "I would suggest that after you get them examined and the applications are obtained that the applications, with the information blanks, which I am enclosing for your use in obtaining the necessary information, be mailed to me. I will, according to common procedure, fill in the amount I think the individual should purchase, sign the application and forward it back to you to be turned in to your branch office. I realize this will take some extra time but it is most important that the application go through my hands before going into the company."

The motto was to be to get there "Firstus with the Mostus." To this end Anderson obtained the cooperation of E. E. Bodge, then a prominent member of the Honolulu business community. Bodge signed and sent a letter which he and Anderson had prepared for prospects on Maui. The one received by Knox, dated August 2, 1952, read as follows:

> "I have taken the liberty of giving your name together with a few other prominent citizens of Maui to Mr. J. Leland Anderson and his associate, Mr. Frank M. Kreidler.

"Mr. Anderson, who is an Insurance and Annuity Counselor for the New York Life Insurance Company, is in the islands for a short stay and brings with him the very latest information about a bank finance plan. This plan is a little new in Hawaii but has been in vogue on the mainland for many years.

"Mr. Anderson also writes this plan for the Manufacturers Life Insurance Company for which we are the Territorial Agents. This plan is new to me and after discussing it with some of the other agents in Honolulu, I was a little skeptical about the legality of it as some of the insurance men here are not too enthusiastic about this plan. In discussing it with our outside auditor and our tax consultant, I find that the plan is entirely legal.

"One of the reasons why some of the insurance agents are not too enthusiastic about this plan is that their companies are not in a position to write this particular type of insurance on account of some rules and regulations which have been in force for many years in their companies. Another reason is that some insurance companies' policies are not acceptable to the banks.

"Mr. Anderson has written quite a few of these policies in the short stay that he has been here—among which are a number written by the Manufacturers Life Insurance Company through our firm.

"I feel sure you will be interested in this matter if you care to give Mr. Anderson or his associate, Mr. Kreidler, a few minutes of your time without any obligation whatsoever."

The first contact was made by Kreidler. He called on Knox and asked if he had read Bodge's letter. Knox said he had but was attempting to decrease the size of his insurance expenditures. Kreidler then threw out the bait, and in substance this was the conversational action and reaction:

"How would you like to get twice as much insurance coverage and pay no more than you are paying at present?"

"Who wouldn't, but how can it be done?" inquired Knox.

The answer was bank financed insurance.

Knox at this time held seven insurance policies on himself and his family with a total coverage of $30,000. When Kreidler returned to Honolulu from Maui he had Knox's preliminary applications for $50,000, $75,000 and $100,000 of additional coverage. Knox had not been asked what his tax bracket was because he confessed confusion about taxation, but the applications contained information on salary, age, and present insurance policies. Evaluating these facts, Kreidler offered the opinion to Anderson that $100,000 was too much insurance for Knox. The reply was that he, Anderson, would determine how much insurance was enough.

As part of what he called his modus operandi Anderson demanded four prerequisites of clients before he would render his service. Knox was to be medically examined to determine insurability; he would put his old insurance policies in the hands of Anderson to be analyzed for their collateral value; Ellen Knox would be present with her husband at all meetings with Anderson; and the schedule which Anderson would draw up

explaining the operation of the insurance plan in Knox's case was not to be shown to any other insurance agent. When these conditions were agreed to, Anderson wrote Knox that he would come to Maui and would "personally present the program and show you exactly how it will work in your case."

Anderson arrived at the plantation house to find a warm greeting from the Knoxes. Bodge's letter had made an impression. The Knoxes knew of Bodge and looked upon him as being one of the "big" men of Hawaii. They were frankly flattered to have been singled out for this visit by a man to whom Bodge had referred as an annuity and insurance counselor of the New York Life Company. Kreidler had called Anderson the greatest man in the insurance field. Anderson was somewhat embarrassed by the build-up which had preceded him. "I may not be the greatest," he protested, then conceded with a modest laugh "but perhaps there are none greater."

To prove this latter point Anderson offered his credentials, testimonials written by Mainland clients. One such letter lauded Anderson's "new approach" to insurance coverage. A businessman had written from Idaho, "Your Bank Financing Plan represented to me the only constructive thinking in the way of Life Insurance Service that had been presented to me in many years. * * * You have rendered a genuine service to us." The Executive Vice President of a refining company stated, "In short you have created a plan and helped work the plan for me."

In matters of personal finances Knox had always found it more convenient to supply an accountant friend with income information and have his tax forms filled in for him each year. His business was growing sugar

and to him an income bracket held no more interest or significance than did some of the more complex aspects of the tax law. His insurance matters likewise had been tended to by others. On a rural island community like Maui it is not considered naive if one places trust in the advice of a neighbor insurance man as to how much coverage one should carry. There seemed little reason to consider Anderson differently. True Anderson was from Los Angeles where business perhaps was more impersonal, but he came in the business fellowship of Island insurance people.

To Knox and his wife Ellen, Anderson read the details of the insurance from the $100,000 policy issued by New York Life. He then explained from the schedule he prepared for Knox (fig. 1) how the amount of the policy could be financed by the bank plan. A letter to Knox by Anderson written subsequently exemplifies the latter's method of presentation:

> "You will note from the schedule in 1953 the only amount you will be required to pay is $1,104 in interest which is all a deductible item on your income tax report. In 1954 you will only be required to pay $205 underage and the interest of $1,013 or a net outlay in a 40% bracket of approximately $1,173. In 1955 the underage will only be about $754, the interest about $1,975 or a net outlay of approximately $1,939. In 1956 the underage will only be $538 plus the interest of about $2,440 or a net outlay in a 40% bracket of $2,002. 1957 is the last year you will be required to pay underage amountint [sic] to approximately $24. The interest that year will be about $2,926 or a net outlay of $1,780. The interest payment is reflected in the schedule for each year, there

after and only increases until 1962 in proportion to the payments made by the bank. From then on, assuming interest rates remain constant, the yearly outlay would be the same.

"You will note from the schedule the average annual gross interest outlay would be only about $3,087 per year and an average net in a 40% bracket of $2,213 per year. The total average annual net outlay would be about $2,285. This includes the average net interest outlay and the average annual underage. I am sure you can readily see the advantages of this outstanding program.

"You will notice the total amount of insurance in force on your life including the old and new insurance is about $190,911. You were paying before for a total of $40,911 of insurance approximately $2,005 per year in premiums. The advantages of the program I am sure are obvious to you from a protection point of view.

"From the schedule you will note that the total cash value in 1973 will be approximately $184,629. At that time you would owe the bank approximately $125,000. If you had not put away any money to pay off the bank loan the net cash value after the bank was paid of [sic] would be approximately $59,689. The total cash value at age 65 if you leave the money to accumulate with the companies will be approximately $226,000. After paying the bank off at that time you would still have a net of approximately $100,000. This amount of cash would provide an annuity of approximately $600 per month for the rest of your life.

"I not only recommend that you use bank money to operate your insurance program but that you set up a reserve to amortize the bank loan at any time in the future. If you would invest at 3% compound interest over the next 27 years, or to age 65, approximately $2,900 per year you would have enough accumulation to pay the bank off in full, and you would then own all the policies outright. The total cash value of approximately $226,000 at age 65 would provide an annuity to you for life of approximately $1,350 per month. This income would be practically tax exempt. You would only pay tax on 3% of the purchase price of the annuity.

"There are four fundamental essentials to a good investment, namely, 1st, SECURITY; 2nd, GUARANTEED [sic] INCREASE IN VALUE, 3rd, QUICK MARKETABILITY, 4th, FLEXIBILITY OF CONTRACT. This Plan embraces all four of these fundamental essentials.

"This nutcracker of inflation and high taxes in which we are all caught impels any good business or professional man to take advantage of every legal tax deduction he possibly can. You will, I am sure, agree that it does no good to take an aspirin for a tax headache. Through the application of the Bank Finance Life Insurance Program, one is able to solve Inheritance and Estate Tax problems, create additional protection for his loved ones, provide greater cash accumulations for retirement later and at the same time create a legitimate income tax deduction. Due to inflation the dollar buys less today than it used to therefore,

there is a greater need to provide additional dollars for loved ones in the event of premature death and options on larger annuities for retirement in the future."

Knox testified, "He spun me all around."

During Anderson's "presentation" Knox occasionally stopped the torrent of words to ask a question. What was the effect on the program of his not being in the 40% bracket as the schedule states? Anderson answered that the program would work just as well in the 30% bracket and besides a final schedule would be submitted in its corrected form.

Knox wanted to know whether he could afford this much insurance. Anderson's answer was in effect, "You must make the decision, Roger. But remember the New York Life people have investigated you. They not only think you are able to carry the $100,000 policy but consider you such a good risk that they have given you a better rate than did your old insurance companies. New York Life is a very reputable firm and does not give everyone such an opportunity. If you have any doubt in your mind, Roger, have an accountant or tax lawyer check my schedule. But of course we have agreed that the schedule will not be shown to any insurance competitor."

The meeting lasted for 45 minutes. Knox signed a note for $974 interest on the bank loan for the first year. In honor of Anderson's visit, housewife Ellen Knox then served her "fancy" lunch in the dining room of their plantation home.

There is considerable doubt as to whether at this point Knox knew he had bought $100,000 additional insur-

ance. It is his testimony that, in signing the note and the other papers which followed, he believed he was preparing the preliminary matters necessary before the new insurance program could go through in its final form. Anderson had stressed the fact that the program was an integrated one. To understand its significance one would have to see the final schedule and that would be forwarded to Knox later. "The realization that I had bought this insurance just grew on me."

However long this realization took, it is established that Knox was fully aware that he was the owner of a $100,000 policy when he met Anderson for the second time. This was in May 1953 on Maui, with Ellen Knox again present. Anderson had discovered when he returned to the Mainland that Knox's old policies contained even more untapped collateral. This was an opportunity to sell more insurance. Anderson brought with him another schedule integrating a $50,000 policy on Ellen Knox into the $100,000 program on Roger. Knox did not protest that this second schedule was also based on a 40% tax bracket. There was little discussion. Knox told Anderson he was not interested in going over the schedule because he recalled the November explanations of the program as to $100,000. All he was interested in was whether or not the $50,000 extra insurance would "fit into my program." Anderson assured him that it did. Besides, Anderson stated, if for unforeseen reasons the insurance proved too great a burden, the amount could always be reduced. Knox was left with the belief that there would be no loss involved if such a reduction became necessary. One merely would switch to lower coverage and continue the insurance program, paying the resulting lower premium. Knox approving, Mrs. Knox applied for the additional $50,000

and both signed a note to temporarily cover the initial premium. Anderson promised to prepare and deliver a schedule showing precisely how the purchased $150,000 bank financed insurance program worked and could be lived with.

When this final schedule was received, it also was based on the 40% tax bracket.

In November 1953 Knox did something which brought upon him the ire of Anderson. After weeks of disturbance at home and at work caused by worry, he took his final schedule to E. P. Wick, an investment broker, for budget advice. Wick showed the schedule to a Prudential insurance agent and received in return the opinion that Knox had bought more insurance than a man in his position could carry. Knox wrote to New York Life explaining his discovered inability to afford the $150,000 program and asked for favorable terms upon which to liquidate. This was possible if the selling agent agreed. New York Life contacted Anderson, who refused to cooperate on the ground that by showing the schedule to another agent Knox had violated their agreement. Anderson wrote to Knox:

* * *

"Now Roger, all the good things I told you about this Program and the benefits you and yours will derive from it are still correct and I feel you should not allow yourself to be deprived of this wonderful coverage that is now in force. * * *

"I still say you are abundantly capable of operating the entire Program. You are a young man and your estate and income will increase. Now is the time to buy insurance when the rate is favorable and while you are insurable. * * *

"I am taking the liberty of again enclosing copy of the Valentine letters—one from Mr. Valentine after the Program was completed and one from his widow after his death. He too had been contacted by a number of insurance competitors who were most jealous of our success in delivering the business. They resorted to all manner of foul tactics to try to upset these people before and after the business was placed. They even contacted Mr. Valentine's attorney and CPA and they told him he didn't need this insurance. However, the Valentines maintained their confidence in me and the results are of course obvious."

* * *

Left with no hope of liquidating upon favorable terms, Knox cancelled the policies with New York Life.

Defendant contends that he did nothing which, in any way violated the tenets of the Golden Rule, his guide in life and business. He claims no knowledge of plaintiff's income or worth. He did feel obliged to point out the pitfalls of the intricate program, but he understood that obligation to be only moral. He represents that he discharged this duty according to his standards. "I answered all their questions," he states. When he held himself out as a counselor he meant only that he was someone clients could "feel easy with" during the sale of insurance. As to the reliance his clients here claim they placed in his advice, defendant remembers nothing. His memory serves him faithfully, however, when he recalls what his clients did. They bought the insurance.

A contemporary legal philospher has observed:

> "Fraud, as defined by law, has such a supremely ugly mien because it appears in court with a smirk of at least temporary success."[1]

No one should be jeopardized for being unusually successful at his trade, but he should be held responsible for the intelligent fulfillment of the duties he has assumed by his own actions. A seller might classify himself as a salesman. Yet where this subjective classification differs greatly from representations he makes about himself in the business community, the Court will be principally concerned with the consequences of these representations.

Defendant has told the Court that he is nothing more than a salesman. Yet in the past he has stated that it had taken him years to work out the details of his bank financed insurance plan based on schedules which he boasted no one could understand. One well qualified expert testified that despite his familiarity with bank financed insurance it took him six or seven hours a day for two weeks to analyze the schedule prepared by defendant for plaintiff. The former Insurance Commissioner of Hawaii testified that he had to spend thirty to forty hours on the final schedule just to trace what happened to plantiff's old policies in the new program.

To whom could plaintiff turn? Defendant had extracted an agreement that the schedules would not be shown to any other insurance agent. Ostensibly such an agreement was to prevent a competitor from moving in and selling insurance after defendant had done the

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[1] Cahn, Edmond: *The Moral Decision*. Indiana University Press, 1955.

preliminary work. Whatever the design, the defendant effectively blocked all avenues of information. True defendant urged plaintiff to consult an accountant or a lawyer, but this was at the stage of his sales pitch when he had gained plaintiff's confidence and calculated this move to lead to greater confidence. Furthermore the information received through these sources would most probably be restricted to the mechanical accuracy of the schedules or the legality of the plan. These factors were never the problem. What plaintiff needed was information as to whether the intricate bank financed plan was suitable to one in his position. He needed to know whether once used as a means to afford more insurance the plan itself could be lived with over the years. The best source of this information, someone with an insurance background, was cut off by defendant.

Frequently during defendant's presentation of his insurance plan issues were avoided and vital questions ignored, evaded or met with half-truth answer or answers susceptible of more than one interpretation. Whether he be a counselor, expert or merely a salesman, the fact remains that defendant after gaining plaintiff's confidence did not explain the insurance plan so that plaintiff understood it sufficiently to make an independent decision. In effect, therefore, it was defendant who made the decisions and who thereby took upon himself the task of rendering intelligent insurance service based on the requirements and capacity of plaintiff. Defendant has failed in his responsibilities

He has failed for the reason that after devising a complicated insurance plan tailored for a man in the 40% tax bracket he sold the plan to plaintiff, who was in the 20% tax bracket. As a result plaintiff suffered a loss. Whether defendant knew plaintiff's tax bracket or not is immaterial. He should have known. It was a pivotal consideration upon which depended the successful operation of the plan over the years.

Defendant claims plaintiff was naive or indifferent to the workings of the insurance plan sold. Perhaps he was. However, the doors of this Court are open to the gullible as well as to the alert and sophisticated. It could be said that a more reasonable man under the circumstances might have taken greater care in ascertaining the significance of the tax bracket factor in the context of the bank financed insurance. Yet it was defendant who conscientiously strove to have plaintiff rely on him in this matter. The nature of the reliance which resulted cannot be utilized to mitigate defendant's culpability. The complexity of the insurance plan sold to plaintiff brings us into an area of the law which has long since seen the demise of caveat emptor. "Buyer beware" lingers now only in the argument of the lawyers.

Plaintiff is hereby awarded his actual damages of $13,309.08. Included in this figure is the amount of overborrowing which on the eve of trial was tendered to plaintiff but which has not been paid because of the latter's refusal to accept. No credit is given to defendant for converting plaintiff's old policies to more favor-

able forms or for the additional insurance coverage for the time it was in effect under the new program. These expenses would not have been incurred had it not been for the fraud.

The Court further awards $2,500 for mental suffering and $10,000 as punitive damages.

Findings of fact and conclusions of law shall be submitted in accordance with local Rule 44(d).

Dated: Honolulu, Hawaii, this 17th day of February, 1958.

J. Frank McLaughlin (Signed)
United States District Judge

APPENDIX "B."

Opinion of the United States Court of Appeals for the Ninth Circuit.

J. Leland Anderson, Appellant, vs. Roger L. Knox, Appellee. No. 16,190. Dec. 4, 1961.

On Appeal from the United States District Court for the District of Hawaii.

Before Chambers, Pope and Hamlin, Circuit Judges.

Pope, Circuit Judge.

The appellee Knox, who was plaintiff below, brought this action to recover damages alleged to have been incurred by him in consequence of alleged fraud and misrepresentation on the part of Anderson, the appellant, in inducing Knox to purchase a certain life insurance contract of the New York Life Insurance Co. Anderson was the company's agent. Knox had judgment in the court below from which this appeal is taken. The trial judge's opinion in the case, which was tried without jury, is reported under the title of Knox v. Anderson, 159 F. Supp. 795. The Judge's formal findings are also reported at 162 F. Supp. 338. For the purpose of keeping the length of this present opinion within acceptable limits we shall not here undertake to set forth at length those findings but will assume that the readers of this opinion have acquainted themselves with the trial judge's opinion and findings.

The negotiations which led to the purchase of the insurance began in August, 1952. Knox, after 30 years of service with his wife and three children, left Hawaii for Maui where he was employed as a field superintend-

ent on a sugar plantation. Anderson, a resident of Los Angeles, had been for many years an insurance representative and salesman, and in 1952 he established an office in Honolulu in association with one Kreidler, also an insurance agent, with a view to selling insurance in the Hawaiian Islands. Anderson had specialized in the sale of what is referred to throughout the record as bank financed insurance or insurance under the bank loan plan. The features of this type of insurance as it was sold to Knox may be illustrated by describing the method of financing the policy which he purchased covering his own life. This was a $100,000 ten-payment life policy. As the annual premiums on this policy were $7,205 and Knox's total annual cash income was only in the neighborhood of $10,000, the insurance was offered to him under this bank financed plan which involved among other things these features:

1. Knox turned over to Anderson his existing life policies with various life insurance companies. These had been issued in sundry face amounts, aggregating something in excess of $35,000. In doing so he authorized Anderson to convert them in the manner which will hereafter be described, and to borrow thereon sufficient cash to pay the first premium of $7,205, and to pledge the remaining cash values of those policies as collateral for the bank loans hereafter mentioned.

2. The plan was that subsequent premiums would be provided by borrowing the amounts thereof from a bank and securing the bank by assignment of the old and new policies. It was calculated that by the time the first such loan was procured the assignable cash value for security purposes would be such that the necessary loan would not exceed 95 per cent of the assigned values.

3. Knox, the insured, would pay each year only the interest on the bank loans, but since his interest payment would be tax deductible the annual net out-of-pocket payment required to be made by Knox in order to carry the plan would be only the interest on the loan less the amount of taxes he would be able to save by deducting this interest in his income tax return. (Obviously the net cost to Knox calculated in this manner would depend in a substantial degree upon the tax bracket in which his income tax was calculated. This saving through deduction of interest paid was deemed to be the main attractive feature of the bank financed plan of paying life insurance.)

4. The purported advantages of obtaining this extra $100,000 of life insurance was that it would at once provide for Knox a large coverage at an early age when the premiums would be low and for a minimal outlay, that outlay being as above indicated merely the interest on bank loans for successive premiums reduced by his tax savings. (As against this, as we shall later have occasion to note, as each year's premium came due, the insured must increase his loan at the bank by the amount of the annual premium and in ter years he finds himself with a very substantial amount owing to the bank, and each year his interest payments increase accordingly.)

5. An aspect of this plan primarily attractive to the selling agent was the size of the agent's commission, computed on the basis of an annual premium far in excess of what would ordinarily be procurable through selling a person in Knox's financial situation the type of policy which an insurance agent might be likely to be able to sell.

For a man whose income and financial condition is such that his income tax puts him in high brackets and

who has the means to liquidate the steadily increasing debt out of other sources, the bank financed plan can well be useful. Much use has been made of the plan under these conditions. Thus X paying taxes in a high income bracket, with resources which he currently wishes to use for other purposes, as for instance in the stock market, may find the bank finance plan of insurance an attractive arrangement. Such a man gets an immediate large coverage of insurance with premiums based on his early age at a time when he is sure of his own insurability.

It is clear from the record that what brought about this controversy, wholly apart from its merits, was that Knox was not that kind of man. Knox had an annual salary of $8100 per year; he had investment income which was not in excess of $1000 per year.[1] This came from securities which he testified had a value of about $12,000. In addition, in his position as superintendent of the sugar plantation, Knox had the free use of an ample dwelling house and the free use of a company automobile. The court found that Knox's income was such that he was placed in the 20 per cent tax bracket.[2] It also found that Knox had expectations of being raised at some time in the future to be assistant manager of the sugar plantation at a salary of $12,000 per year.

The court found that Knox was induced to buy the life insurance policies above mentioned by certain repre-

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[1]The court found $1500 per year; Knox said "$1500 or $1600."

[2]It was stipulated that his actual tax bracket for the purpose of calculating deductions of interest under the bank loan plan would be 21%. Of course a precise bracket of 21% could not be found. It is assumed that the stipulation is based upon a calculation that not all of his deductions would come off his top bracket.

sentations made to him by Anderson which were false and fraudulent. These representations upon which plaintiff relied are listed at length and in some detail under paragraph 8 of the findings beginning on page 340 of 162 F. Supp.

In a subsequent paragraph 9, the court found that Anderson failed to disclose to plaintiff certain material information and facts which he knew with respect to the proposed insurance plan; that Anderson was under a duty to make disclosure because of a relationship of trust and confidence, and because of Anderson's superior knowledge; and the court concluded that liability on the part of Anderson accrued not only from the alleged false and fraudulent representations, but also from these failures to disclose.

We think that for the purpose of disposing of this appeal we need go no further than to consider the facts relating to what the court found to be the central and primary representation made by Anderson with respect to the policies purchased, namely, that Anderson represented to Knox, under circumstances permitting him to rely thereon, that the proposed plan for bank financed insurance which Knox agreed to purchase "was a suitable program for plaintiff and his family and fitted their needs."[3]

We shall note as we proceed that the trial court treated this representation as one of fact and not as a mere expression of opinion. Our discussion of that question will await our primary inquiry: did the evi-

[3]This is an abbreviated method of referring to the alleged representation as to suitability. The representation included statements as to the reasons for its suitability, more fully developed in subdivision (a) of paragraph 8 of the findings above referred to.

dence here warranted the judge in finding that there was such a representation and that the representation as made was false.

It is our opinion that the evidence before the trial court warranted its findings that there was such a representation of suitability and that such representation was not true in that the insurance program sold to Knox was in fact not a suitable one in view of all the facts then existing with respect to him—his income, his financial condition, his prospects, his family, and their prospective needs.

The question whether the representations made by Anderson to Knox were actually false or made with such recklessness as to make them substantially fraudulent, is a more difficult one; it turns in part upon a decision as to whether the representation of suitability was in truth a representation of fact and not a mere expression of opinion. In approaching these matters it is not the function of this court to find the facts initially but merely to ascertain whether the facts as found by the trial court were, in view of the record, clearly erroneous.

Our inquiry is directed to the determination as to whether a case was made here upon a claim of false and fraudulent misrepresentation of facts upon which Knox relied to his detriment. There is some language in the findings which suggests that the trial court might have proceeded upon the theory that there was a fiduciary relationship of some kind between Anderson and Knox. Thus the court's finding (102 F. Supp. at 341), refers to the defendant's failure to disclose material information and facts "which defendant was under a duty to disclose to plaintiff because of the relationship of trust and confidence which existed between plaintiff

and defendant and the superior knowledge of the defendant." Similar language is used in the first of the court's conclusions of law where it refers to a "relationship of trust and confidence which existed between plaintiff and defendant".

However, we find it unnecessary to inquire whether a fiduciary relationship did exist between Anderson and Knox. We assume that it did not, for it is plain that Anderson was the agent of the insurance company and as such agent he endeavored to make a sale to Knox who must have understood that he was dealing with an agent of another party.

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[1] Appellees in supporting the judgment have placed considerable emphasis upon the case of Upland Butter Estate Company v. Woodruff, 103 Cal. 564; 129 P. 351. That case, referred to later in this opinion, was one in which the defendant architect was sought to be made liable in consequence of his representation that a building for which the architect drew plans and specifications could be constructed at a cost not to exceed a certain amount. The question presented was whether the architect's assertion was a statement of fact or an expression of opinion. It was held that the defendants had been guilty of a breach of duty in a failure to make disclosure of certain facts, the court saying that: "By virtue of this agency and relationship of trust and confidence it became the high duty of defendants to make full disclosure of all the knowledge which they possessed and which was obtainable or important that their principal should have." For a recent case in which an insurance agent was charged with liability for failure to give information to a property owner for whom he had acted as an insurance broker, see Hardt v. Brink, (D. C. Wash.) 102 F. Supp. 870.

But in each of those cases where liability was projected upon a failure to give information the defendant was clearly the agent of the plaintiff. We do not discern any such agency relationship here. Anderson was not a full time agent of New York Life. He had what he called a "brokerage contract" with that company.

In writing to Knox, Anderson used a letterhead in which his name was followed by the designation "Insurance and Annuity Counsellor." Above his name appeared the words "Life Member Million Dollar Round Table N.A.L.U." "N.A.L.U." was the abbreviation for "National Association Life Underwriters,

Whether the Representation Was Made

At the time Knox was approached for the purpose of inducing him to buy the insurance which Anderson was undertaking to sell, Anderson was using the Honolulu agent Kreidler above mentioned. Kreidler had made advance arrangements with Knox for Anderson's visit to the latter's home, and Kreidler was present at the

the members of which subscribed to a code of ethics which contained a preamble reciting: "The position of the life underwriter is unique in that he is the liaison between his client and his company. As a life insurance adviser he owes a high professional duty toward his client but at the same time he also occupies a position of trust and loyalty to his company. Only by observing the highest ethical balance can he avoid any conflict between these two obligations. Therefore, I believe it to be my responsibility to hold my business in high esteem and strive to maintain its prestige." Its first two precepts were stated to be as follows: "Two. To keep the needs of my clients always uppermost. Three. To respect my client's confidence and hold in trust personal information." The reference to the insurance purchaser as a client is interesting.

In Steadham v. McConnell, 149 Cal. App. 2d 334, 308 P. 2d 361, the court upheld the action of the Insurance Commissioner in suspending the license of a life insurance agent for making false and fraudulent representations in selling bank financed life insurance. The court said: "The appellant was an experienced expert in the field; the insured a naive layman who was led to believe that the bank plan would meet certain expressed objectives. Certainly the relationship was a fiduciary one in which Mr. and Mrs. Stokes were entitled to believe appellant's material statements."

In Hawaii, as in California, life insurance agents are required to procure a license to solicit and sell such insurance. (Rev. Laws of Haw. 1955, §§181-305). Such license may be suspended or revoked if the licensee has "with intent to deceive, materially misrepresented the terms or effect of any insurance contract; or has engaged or is about to engage in any fraudulent transaction; or is in the conduct of his affairs under the license, the licensee has shown himself to be a source of injury and loss to the public". (§§181-402). It is conceivable that one who is thus licensed is by virtue of the act made to assume duties toward his purchasers comparable to the fiduciary obligations of lawyers and physicians, and that this concept may have been the basis for the quoted statement in the California case cited.

time the sales efforts were being made by Anderson. Kreidler testified that Anderson then expressed his opinion as to the suitability of his plan for Knox and his family. He said: "Mr. Anderson explained that it was advantageous to Roger Knox and his family, that it would benefit him at all times and that it was cheaper too, as long as he could afford it under a credit of tax deductibility, that he might as well have it and not need it than to need it and not have it, that it was an excellent plan throughout the entire period of this man's life."

The opinion of the district court sets out at length (159 F. Supp. p. 803) a letter written later by Anderson to Knox which it found "exemplifies [Anderson's] method of presentation".[5] Among other things to the same effect, the letter stated: "I am sure you can readily see the advantages of this outstanding program"; and "There are four fundamental essentials to a good investment, namely, 1st, Security, 2nd, Guarantted [sic] Increase in Value, 3rd, Quick Marketability, 4th, Flexibility of Contract. This Plan embraces all four of these fundamental essentials."

In substance the testimony of the witness Kreidler as well as that of Knox and his wife was to the effect that many similar statements were made by Anderson to Knox at the time that Anderson first presented the insurance deal to him.

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[5]We shall have occasion later to discuss the relevance and admissibility of this letter which was written after Knox had completed his purchase of the $100,000 policy and of another $50,000 policy on the life of his wife. It would appear from the trial court's opinion and findings that it regarded the writing of this letter as a part of a continuing plan, design or scheme. See Wigmore on Evidence, 2d ed., §304, and McCormick on Evidence, p. 346

Anderson testified that he made no such representation as to the suitability of the program he was selling. Plainly the trial judge did not believe him. Indeed, as we note hereafter, Anderson testified that the question of the suitability of the bank loan plan for Knox and his needs did not concern him.[8]

That Anderson did in fact inform Knox that the program was a suitable one and strongly urged him to purchase the insurance as meeting his needs and consistent with his capabilities is supported by evidence which the trial court had the right to believe.

Knox's Right to Rely

We are also of the opinion that under the circumstances of this case the court was fully warranted in finding that Knox had the right to rely upon these representations of suitability. The court's opinion and its findings reflect the view that Anderson went to considerable pains to lay the ground work for a maximum impact of his salesmanship upon Knox.

As there noted Knox first received a letter of introduction from E. E. Bodge, president of a Honolulu business corporation, describing Anderson as an insurance and annuity counsellor who was temporarily in the Islands and who had the latest information about a bank financed loan plan. Bodge indicated that at first he was skeptical about the plan but he had made inquiries and found the plan entirely legal; that some insurance companies were not enthusiastic about it because they

[8] In substance his story was the same as that given by him in a letter of explanation written to an officer of the New York Life: "From the schedule photostats of which are enclosed herewith and the explanations given to Mr. Knox, you can readily understand that he and his wife made up their own minds."

could not write this plan. It was suggested that Knox might care to give Mr. Anderson some time for presentation of this matter. The plain inference was that Anderson had superior knowledge on the subject. Anderson had suggested the writing of the letter and examined its form before it was sent.

Anderson gave Kreidler instructions to approach his prospects keeping them in "anticipation of meeting me" and explaining that "I will be able to give them all the information they desire."[7] Kreidler testified: "I, naturally, as a part of my work gave Mr. Anderson a big build-up as to his ability and capability and qualifications."[8]

The finding of the trial court, (162 F. Supp. 343), that when Knox purchased this program of bank fi-

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[7]Kreidler was to get their agreement that "my modus operandi will not be divulged to any other insurance competitor . . . I would suggest that the least [sic] you tell them and the more you can keep them in anticipation of meeting me explaining to them that I will be able to give them all the information they desire if they will but cooperate in the above requirements." The quoted sentence lacks some grammatical completeness but the meaning conveyed seems to be "The less you tell them and the more you keep them in anticipation of meeting me the better it will be."

[8]Kreidler testified that he represented to Knox that Anderson was a very successful insurance man, an authority on the bank financing plan and its ramifications as to tax savings and the ability to carry additional insurance. He used testimonial letters relating to Anderson to develop this idea with Knox. His procedure was to talk to any prospective purchaser about the merits of Anderson's ability to present a plan of financing life insurance through a bank, telling them, including Knox, that after certain preliminaries Anderson, who was the expert in this line of work, would present a prepared and accurate schedule outlining what the bank financing plan would accomplish for him. He testified that Anderson himself had said that he was the only one that was qualified "to do this tremendous job of bank financing and that others that tried it failed by the grapevine."

nanced insurance "defendant knew that he did not understand said program and did not intend that he should understand the same and plaintiff did not make an independent decision thereon but relied completely upon the defendant" cannot be said to be clearly erroneous, not merely because of the assurance which Kreidler gave Knox that he was about to meet a man who was especially qualified to give information in this field, indeed "the only one that was qualified to do this tremendous job",[9] but also because there were circumstances from which the court could infer that Knox was obliged to take the program on faith and in many important respects to act in the dark.[10]

When Anderson arrived in November, 1952, he brought with him a schedule which was received in evidence as Exhibit 4, which purported to set out the details of the proposed bank-financed insurance program.

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[9] Anderson, testifying, conceded that "they would have a right to believe that I had had considerable experience in selling life insurance and bank finance plan." Mrs. Knox testified: "Well my husband said that he had given him all our financial statements, everything to do with our finances; our income and our taxes, and everything, and therefore, he said, well, I don't understand this schedule but you have everything in front of you and if you advise us to take this $100,000 schedule program why, and you know we can afford it, well, let's take it. . . . We just had great confidence in him even before he came in the door. . . . I remember him saying that it took years of study to figure out this bank loan program, and the very fact that he didn't want to show it to any other salesman proved to me that he considered them too stupid to follow it up, and that it would only confuse us. From that, he was an expert as far as we were concerned."

[10] This is evidenced not only by what Anderson told Kreidler about his schedules being hard to understand, as noted infra, but by the numerous respects in which the various schedules furnished Knox by Anderson were deficient, incomplete, or in error. These schedules were the basis for the sales. Their deficiencies are treated hereafter where we discuss the question whether the program sold was in fact a suitable one.

It is plain from an inspection of that schedule that at the time if was used in the presentation of the plan to Knox, which was the time when he signed up for the $100,000 policy, it was impossible to tell from that schedule what was about to happen to Knox's old policies.[1] As Kreidler put it, it would not have been possible for a prospective purchaser from this schedule to tell what the actual cost of this program was in the terms of what changes had been consummated in the old program. Kreidler said that he made inquiry as to why the schedules prepared by Anderson, such as Exhibit 4, were so complicated. Anderson replied that he had "spent a good many years devising this schedule that no one could understand." Kreidler said: "Even I couldn't understand it."

In May, 1953, Knox was approached by Anderson again with a proposal that he purchase a further New York Life policy on the life of his wife Ellen for $50,000. It had become apparent at that time that there was enough value in the old policies to permit the addi-

[1] A glance at that exhibit, which appears on page 799 of 159 F. Supp. makes this plain.

As indicated a portion of the insurance program sold to Knox involved the changing and alteration of his existing insurance policies; this included the borrowing upon them of funds for the payment of the first premium on the new New York Life policy. Another change involved the alteration of the policies so as to accelerate the premiums and increase the cash values more rapidly. To effect this Kreidler, on the direction of Anderson, procured from Knox his signature on the necessary loan applications addressed to those companies, and when the proceeds of the loans were transmitted through checks payable to Knox, Knox's endorsement of those checks was procured; they were made payable to "J. Leland Anderson, Trustee," and Anderson proceeded to collect the proceeds and disburse them. Knox testified that he had attempted to learn from Anderson how these moneys were used and why and was then told "You must have faith and confidence, you must believe." As Kreidler put it, that was all there was to it.

tion of such a policy to the bank financed plan. At that time another schedule, received in evidence as Exhibit 8, covering both the Roger Knox and Ellen Knox policies, in form somewhat similar to Exhibit 4, was presented to Knox. This again had the same infirmities as Exhibit 4 in respect of what was to happen or what had happened to Knox's old policies. In fact, the evidence is clear that Knox was told that all of the facts relating to the program would have to be furnished by Anderson to him at a later time. Kreidler stated that this use of a preliminary incomplete schedule with the understanding that the purchaser would obtain a final schedule was a part of Anderson's plan of selling this type of insurance.[12]

The evidence was that at the time Knox signed up for either of these two policies he could not have ascertained the facts as to their values, their premiums, their dividends, their loan value, their interest provisions, even if he had employed a certified accountant. The policies were then in Los Angeles and Anderson had not accounted for the checks which had been endorsed to him; but after the close of the November, 1952, interview, and after Knox had signed up for the $100,000

[12]Kreidler testified: "In general, when a man was induced to buy under the bank financing plan he had a preliminary schedule which seemingly looked attractive to him at that time. When he had signed the note for the amount of the premium with the understanding that he would obtain a final schedule, and when that final schedule was delayed months and in some cases, in quite frequent cases, 11 months to a year, any changes or any reflections on that final schedule would have put the insured in a position that he could [illegible] anyhow, he had already spent his money, he had no opportunity to consult with his attorney or a certified public accountant as to what he would have actually received under the bank financing plan, and there was no possibility of getting out on the program without a substantial loss of money due to delay in presentation of the final schedule."

policy, Anderson told Knox and his wife they would get all factual information when they received the promised final schedule.[13]

We are of the opinion that there was sufficient evidence in the record to warrant the trial judge in believing and finding that Anderson, either in person or through Kreidler, represented to Knox that here in Anderson he found the man who was not only an expert in this field but practically the only man alive who understood the plan fully and that here was a man upon whom Knox could rely for information as to what he was buying. In short, Anderson, the court found, in substance said: You can take my word for what I am now telling you; later I will give you a schedule showing just what you have bought and how it works.[14]

It is clear that in fact Knox did rely upon Anderson's statements and we think that it would be idle to argue here that Knox should have found out for himself because of some principle of caveat emptor that the program was not at all what it was represented to be. Knox testified: "I had my faith in him because he was recommended by a leading business man in the Territory. I figured he knew what he was talking about. He had all the facts in my case. I figured he was giving me something that was desirable for me."

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[13]Kreidler testified: "To the best of my knowledge as we were leaving Mr. Anderson told the Knoxes that when they saw the final schedule with all of the factual information contained therein, that they would be pleased to know that their family was protected under this very—that they would be well pleased with the protection that was afforded under this plan."

[14]As a matter of fact the promised schedule introduced as Exhibit 10V was not forthcoming until September, 1953. It was accompanied by a letter addressed to Knox dated September 14, 1953 (Exhibit 10B). We shall have occasion to discuss these documents later.

Mrs. Knox testified: "We just thought, well, he will know more than most insurance men because he is so nationally famous, we more or less thought. Living on Maui we felt very fortunate to have a man of his calibre come to our islands . . . He quoted and used many glowing adjectives . . . when he referred to his program it was a wonderful program; he stressed this, he stressed its goodness." She said that before they met Anderson she and her husband had been trying to arrange it so as to lessen the costs of their existing insurance program: "We were paying out too much, we felt, then on the insurance. And Mr. Anderson showed us that this would be cheaper than our old program, and we would get much more insurance, which was most attractive."[17]

Some of the circumstances illustrating how Knox relied on Anderson's statements are illuminating. For instance, it appeared that during Anderson's sales talk, alluding to the schedule, Exhibit 4, Knox called attention to the fact that the schedule showed a 40% bracket, stating that he, Knox, was not in that bracket. Anderson explained that "even if you are in the 30% bracket, it would still be favorable."

Again, as the sales conversation proceeded, the Knoxes inquired about reducing or dropping the program after they started it, in case they found it burdensome. Anderson assured them they could do so. What he neglected to tell them was that they could do so only at a very substantial loss. (Finding 8(b) (3).) But it is plain that this assurance helped to lessen any

[17] Knox did not so testify that Knox was attempting to reduce his annual insurance outlays and his existing insurance program. Anderson is of course chargeable with this knowledge.

concern they might otherwise have had about entering on this extensive undertaking. Again Kreidler testified that Knox, noting Exhibit 4, said that the amounts in the last 15 years on the schedule were more than he was currently paying in premiums; that Anderson then said: "Disregard the schedule; it will nevertheless cost you less." Kreidler continued "He used the terminology that he would have more insurance protection for his family for less outlay of dollars."

The facts here related, and thus credited by the trial court, sufficiently establish Knox's right, as a matter of law, to rely on these representations as to suitability, if, as the court found, the representations were false, and were made with intent to deceive.[15a] Appellant argues, quoting from Kerr, Fraud & Mistake, 254: "A man who abstains from inquiry where inquiry ought to have been made cannot be heard to say so and to rely on his ignorance . . . In the absence of inquiry where inquiry ought to have been made, the Court is bound to assume that the person from whom inquiry should have been made would have done what it is his duty to do." Such a rule is not apposite to the fact situation present here. As Prosser has noted (Law of Torts, 2nd Ed. p. 552): "The last half-century has seen a marked change in the attitude of the courts toward the question of justifiable reliance," and quotes from Chamberlin v. Fuller, 59 Vt. 247, 256, 9 A. 832, 836, the now classic statement that "no rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool." And Harper & James, The Law of Torts, §7.12 puts the rule thus: "It does not lie in the

[15a] As we shall note hereafter, a representation made without any belief as to its truth, or with reckless disregard whether it be true or false, is one made with intent to deceive.

mouth of a defendant to argue that although he intended to cheat the plaintiff, by lying to him, the latter ought not to recover because he should not have trusted him," adding a footnote as follows: "Jenness v. Moses Sake Development Co., 39 Wash. 2d 151, 160, 234 P. 2d 865: 'Unquestionably appellants were naive and credulous, particularly in the light of their experience in the tavern business, but the rule is well settled in this jurisdiction that a wrong-doer cannot defend his wrongful actions by calling attention to his victim's gullibility.' An early leading case is Togni v. Tamenelli, 11 Cal. App. 7, 14, 103 Pac. 899 (1909), in which Cooper, P. J. reasoned that 'No one has a right either in law or in morals to complain because another has placed too great reliance upon the truth of what he himself has stated' (Cases cited)"

Was the Program Suitable, as Represented?

This brings us to the next inquiry which is: does the record support the court's finding that the program sold to Knox was in fact not suitable?

Here again we must say that the court's finding on this point was not clearly erroneous. There was considerable evidence to support it. Some of it came from qualified experts in the insurance field who undertook to demonstrate through analysis of the Anderson proposals and with the aid of charts, diagrams and mathematical calculations that the program sold to Anderson was not a suitable one. While the schedules (Exhibits 4, 8 and 10A) furnished by Anderson were not self-explanatory, and required extensive mathematical calculations to disclose just what the program contemplated, yet once those calculations were made, it was not difficult for the court to draw its factual inference of unsuitability from these figures.

The expert witnesses, both those for the plaintiff and for the defendant, were in substantial agreement as to what would constitute a suitable insurance plan for Knox and his family and as to what factors would have to be considered in order to determine such suitability. We think that appellee has correctly summarized the views of these witnesses in saying that they agreed "it was necessary to know (i) the details of the existing insurance program; (ii) its values and benefits, (iii) the cost of continuing the old program, (iv) the additional cash outlay for the new program, (v) loss of values and benefits, if any, under the old program, and (vi) the additional values and benefits of the new program."[16]

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[16]Anderson on cross-examination, albeit with a certain degree of evasiveness, admitted that these factors would have to be taken into consideration. He testified: "Q. Mr. Anderson, do you agree that in determining the suitability of a program of insurance such as the one that you were presenting to Mr. Knox to be financed by bank finance plan, that first you would have to know the existing program, what was provided, what it will cost to continue the program, and also the benefits of the existing program? Do you agree with that? A. I am sure those are factors. But all of these points don't mention the right of the individual to make his choice. Q. I will get back to that. That certainly is a necessary element in the consideration of suitability, is it not? . . . A. Yes, with qualifications. There are certain things you must also take into consideration. Q. I know that is just one of the elements, isn't that right, what I have recited in my question to you? A. Not one. You recited several elements. Q. Shall I go over it again? The Court: Wait. Try to stop guessing as to why he is asking these questions or anticipating his point. Just answer the question and we will get along better. . . . Q. . . . In determining the suitability of a program such as the one that you were presenting to the Knoxes to be financed by the bank loan plan of finance, take one element at a time—it would be one of the elements to be considered or one of the elements to be considered is, was there an existing program? Just stop there. Isn't that right? A. Yes. I think that is true. Q. All right. Number 2, you would want to know what the existing program was, what it provided, what coverage it provided, is that right? A. Yes. Our schedule called

Van Cleve, a thoroughly qualified experi in the insurance field, with 37 years of experience, demonstrated with a great degree of clarity and reference to specific details, the reason why the Anderson program was not suitable for Knox. With the use of figures and amounts he demonstrated that the program failed to provide the protection Knox was led to think he was getting; that it in fact destroyed some protections he already had; that the program was not worth the money it would cost; that Knox could not afford it; and that he did not understand it.

A rather striking thing about the pattern of the new program was that under it Knox's insurance protection sharply decreased for the first ten years during which

for that. Q. You would want to know, would you not, what the cost was of the existing program? A. Yes, our schedules require that. Q. Just answer the question and we will get on better. We will get to the schedules afterwards. Third or fourth whatever it is you would also want to know the benefits that were contained in the existing program, isn't that right? A. Yes, our schedule calls for that. Q. Then you would want to know what additional cash outlay there would have to be for the new program and what additional benefits you would get out of the new program, isn't that right? A. Yes, the policies and the schedules call for that and show that. Q. Then you would next want to know what the variables and the risks of the new program were so that you could appraise whether it was suitable to answer, suitable or desirable to enter into the program, isn't that right? A. Yes. I like the term 'variable' much more as simplifying 'risks.' Q. That is another thing that would have to be known, what the variables or risks were. All right. You would also want to know what the loss ratios or benefits under the old program if there were any loss, isn't that right? A. Yes, but there were no losses. Q. I am not asking you about this program for the moment. I am just asking you generally. If there were any losses under the old program, you would want to know what they were? A. Oh yes, if there were. Q. Next and finally, in order for it to be suitable there would have to be some reasonable understanding on the part of the man that was buying it, how the program works, isn't that right? A. Yes, I would say so. This was done also.

premiums had to be paid so that at the end of that time the amounts receivable in the event of death were hardly more than he would have collected had he left his insurance policies as they were under his old program. The reason for this was that Knox himself would start out with a new $100,000 New York Life Insurance policy added to his old policies, but in initiating the new policy, as previously indicated, he had to borrow substantial sums from the cash reserves of his old policies thus reducing their protection and in each year thereafter he had to borrow from a bank the annual premiums of $7205 payable each year for the ten year period. Although the plan contemplated that he would only pay the interest on that $7205, yet each year during the ten years his bank indebtedness would increase by another $7205. In like manner he had to borrow on account of the premiums on Ellen's policy $3758 each year and thus enhance the total bank loan by that additional amount.

The net result of this was that at the end of ten years he would owe the bank $125,000. If he could have died in the first two or three years, under this program his beneficiaries would reap some substantial benefits from the Anderson plan; but these benefits taper off very rapidly because all of his policies, old and new, were required to be pledged with the bank as collateral for the loan; therefore the amount collectible on death would be only the balance remaining after payment to the bank.

Thus, even Stoessel, an expert testifying for the appellant, stated that by 1961 the difference in death benefits between the old program and the new would have been only $23,000. In the meantime, although Knox

under his old program was paying premiums of $671 per year, during the ten years up through 1961 he would pay out in excess of $29,000 in gross interest, and some $17,580 in net interest, even assuming he was in a 40% tax bracket, and assuming the interest rates used for calculation of the schedules. Ten years of payments of the old premium would make a total of $6710. Based on the tax bracket and interest rates mentioned, the net interest cost of $17,580 would then be $10,870 more than the cost of the old plan which would appear, even on Stoessel's calculation, to be an excessive extra cost for $23,000 in additional death benefits.[17]

The evidence showed that this sliding downhill of the amount of the available protection was not the only decreasing aspect of the Anderson plan. By the conversions of the old insurance policies previously mentioned, the net insurance in force under those policies in 1953 was decreased $7792, "a permanent loss". The conversion also eliminated a family income rider which provided insurance in the nature of term insurance in the amount of $10,000. That family income rider would have been effective until 1965. Of course at that time the family income provision would have terminated in any event, but the effect of the adoption of the Anderson plan with its conversion of the old policies cut this family plan benefit off at once.

Van Cleve, in describing the plan, noted that the pattern of any insurance under this type of bank loan "program" is a high start going down very rapidly to

[17] And of course after the first ten years, his bank loan, which had reached $125,000 would require net annual interest of $2020 as long as he lived.

approximately half of the amount of the insurance at the end of ten years. He said that that pattern does not fit in with the apparent needs of a family. In the situation of Knox, with a wife and three small children, the last child would not be through college until 1969. A suitable insurance program therefore should avoid being sharply lowered at just the time when it is needed the most.

What was needed he said was a level amount of insurance up to about 1969-70-71; after which the children might be self-supporting, and that a tapering off would be satisfactory as there would be only the wife to look after from that time on. This was one of several reasons why Van Cleve concluded that the Anderson plan was not a suitable one for Knox and his family. He compared the pattern of insurance which Knox had been carrying under his existing policies with the pattern set up in the bank plan. Referring to schedule Exhibit 4, he noted that the old policies there listed showed life insurance in the amount of $40,911. There were dividends accumulating shown on that chart: "So we have at least, $42,098 of gradually increasing insurance protection in force." This was in addition to the family income policy which had 13 years yet to run. In addition some advance premiums had been paid on some Sun Life educational policies so that in the event of death there would have been some $57,000 life insurance in force in 1953.

This, according to Van Cleve, was a suitable program for the family at that time—"far better than the average man of 30 on this salary ever get to." He was of the opinion that the program might have been improved by the purchase of an additional $20 to $25,000 worth of insurance, something that would not have

involved the radical change contemplated by the bank loan plan.

Another respect in which Van Cleve noted adverse and unsatisfactory results coming about through the purchase of the bank loan plan was the dissipation through the change-over of certain emergency reserves which were available under Knox's old policy. Had those policies been left alone there would have been available for Knox through his borrowing privileges substantial amounts which he might use in an emergency, such as sickness in the family or to take advantage of an opportunity to go into business, etc. Through the conversion of these old policies and changing them by borrowing, as was done to initiate the bank loan plan, this value was gone. It was gone because the approximately $14,000 which was available for such emergency purposes under the old policies had been used to pay the initial premiums on the New York Life policies which included Anderson's commission; and the remainder of that policy value was now pledged to the bank under the bank loan plan.

Another adverse result of the Anderson plan which came about through conversion of the old policies was that after the changes were made, certain educational policies which had been earmarked for the education of his children, would not be available for those purposes as planned. These were policies for $5000 each, plus dividends, one to have matured in 1959, another for the next child in 1961, and the final one in 1965, these being approximately the eighteenth birthday of each of these children. But the chart, Exhibit 10A, showed that in 1959 the collateral value of all policies pledged was $98,787, and the bank loan would then be $97,413.

and since the bank would not loan beyond 95% of the collateral, the $5000 needed for the oldest child in 1959 would simply not be there. The only way the proceeds of that policy could have been obtainable in 1959 would have been to pay the bank something over $4000 at which time it might be released. Similar periods would elapse beyond the planned dates of 1961 and 1965 for receipt of the sums under the other two educational policies.

Van Cleve also testified that the usually accepted practice among good life underwriters was not to permit a policy holder to contract for more insurance than he could comfortably afford. He explained that in the event of an emergency policies often lapsed to the detriment of both the policy holder and the company; that the usually accepted safe limit for a man in his 30's, with a family to support, would be a life insurance plan calling for some 10 or 12 per cent of his income,— "Ten or twelve percent should be about the maximum you should go."[18] On the same aspect of the suitability of the plan, Van Cleve also testified that it is a standard rule among most insurance companies not to write insurance more than ten times a man's annual income; however, when Knox had ordered his $100,000 policy, that brought his insurance to approximately fifteen times his income. As Van Cleve remarked, "Frankly in reviewing this, I was surprised that

[18] On the assumption of the correctness of the interest rates and tax bracket set forth on Exhibit 10A, the final schedule furnished by Anderson describing the plan, by 1960 Knox's bank loan would total $10[illegible]23, on which the total interest would be $3812 in that year. On the exhibit's assumption of a 40% tax bracket, his net interest would be $2287, or approximately 23% of his gross income; double the acceptable limits testified to by Van Cleve and by 1962 this net interest would be $2618, or 26% of his income.

$100,000 was obtainable. It would have been a difficult job to get I would think."

But the whole plan that Anderson sold to Knox included another $50,000 on the life of Ellen. Van Cleve testified that there was no sound reason for having anywhere near that much insurance on Ellen's life as she was not a wage earner. The court could well infer from this testimony that the extra $50,000 was written primarily to load Knox with insurance totaling nineteen times his annual income.

The various charts furnished by Anderson to Knox recited in their caption: "Interest rates and dividends are not guaranteed." It is apparent, however, that if the calculations made on those charts are based upon unrealistic assumptions of interest rates and tax brackets, that fact alone has an important bearing upon the suitability of the program and whether Knox was entered upon a safe or a hazardous undertaking.

None of the schedules stated the interest rates used in the calculations but Van Cleve was able to calculate them from the figures shown. Exhibit 10A stated with 4.25 percent in 1953, reduced to 4% in 1954, to 3.75% in 1956, and to 3.5% in 1960, continuing at that rate until 1973. As counsel for Knox pointed out, in judging as to the suitability of the proposed program, fair allowance must be made for contingencies. Van Cleve testified that any one selling this program should take into consideration certain contingencies and variables which would alter its usefulness in important particulars. One variable was the tax bracket which for Knox might remain at about 25%. Another variable was the interest. Van Cleve said that the interest rate instead of going down to 3.5% might well go to

5%, which would be the probable rate at which a loan would be made by the insurance companies themselves.[19]

If the necessary outlay which Knox would have to make to carry this new program were based on an interest rate of 5% (which later experience showed would have been the case) and upon the stipulated tax bracket of 24.6%, then Knox's gross interest for 1960 would have been $5440.15, and his net interest $4106.40, 40% of his gross annual income. This would be a preposterous burden for a man in Knox's situation. Obviously the court could properly hold that a program which involved such contingencies, so possible and so real, was not suitable for a man of Knox's earning capacity.

In this same connection Van Cleve testified that the bank financed insurance plan could not be justified for any person whose taxes were under the 50% bracket. As previously stated, Knox's gross income was far below the $24,000, which it was stipulated would be the lowest gross income which would provide a tax as high as 40%. With his actual income tax bracket at the stipulated 24.6%, we have to note here a further reason why this bank financed insurance program was unsuitable for Knox.[20]

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[19] Van Cleve was testifying in February, 1957. He said that the current rate for such a loan as of December preceding would be 3½% to 5%, with many banks that formerly took such loans canceling them even if you offered them 5%. He explained the difficulty in obtaining a sure supply of money such as here contemplated from banks, because of fluctuations in the demands which the banks received. On the basis of many years experience with bank loans collateled in the form of insurance policies, Van Cleve explained that frequently the bank loans were unavailable.

[20] Appellant tries to justify his use of the 40% bracket on the assumption on the ground that it was [illegible] be an average

Another portion of Van Cleve's testimony dealt with the problem of suitability of the Anderson program as an investment for retirement. He said that the plan sold to Knox was an unsuitable one because it provided neither desirable investment savings nor retirement benefits. The evidence justified the court's belief that the new program was represented as one which would provide desirable retirement benefits. According to the witness Kreidler, Anderson undertook to sell Knox's program on the basis of it providing retirement funds when he reached age 65.[21] The record does not show how much in the way of retirement benefits Anderson and Kreidler represented the plan would produce. Mrs. Knox testified that when the other policy was sold in May, 1953, Anderson said the retirement benefits would be "around" $800 per month. The inference is plain that the plan was sold as suitable and valuable for that purpose.[22]

bracket for Knox, over a period of years. There is nothing in the record to show that Knox could count on ever attaining a $24,000 income, much less that his income would ever average that much.

[21]Kreidler's testimony was as follows: "Mr. Anderson told Mr. Knox that he would have a substantial increase of insurance protection at a reduction of dollar cost to Mr. Knox, and that at all times throughout this entire program he would have additional insurance, he would have accumulating gross cash values and dividends, and he would be [illegible] to have retirement funds that would be available when he was ready to retire at age 65. And he would also have educational funds that would be available for his children when they were ready to go to college, if he lived or at [illegible]."

[22]In his letter of September 13, 1953, which accompanied the schedule (Exhibit 10), Anderson said: "The total cash value at age 65, if you leave the money to accumulate with the companies, will be approximately $220,000. After paying the bank off at that time [illegible] approximately $100,000. This amounts to cash which provides an annuity of approximately $800 per month for the rest of your life." Appellant contends that the latter was inadmissible and irrelevant

Van Cleve's testimony was that at age 65, the total values of the policies would be less than those stated in Anderson's letter; that the net, after deducting the total bank loan of $125,040 would actually be $92,576. But beyond this, the schedules and Anderson's letter failed to disclose that on surrendering of a policy the difference between the surrender value of the policy and its actual cost (which would not include the interest paid on money's borrowed to pay the premiums) would be taxable.[24]

But whether the tax would be $41,753, as Van Cleve figured, or $30,000, as Stoessel estimated, it would be a very substantial amount. Instead of having a sum for annuity such as that stated in Anderson's letter, the amount would have been barely sufficient, accord-

since it was sent after both policies had been bought. But as suggested in footnote 5, supra, both Wigmore and McCormick would agree that it was admissible both (1) to evidence Anderson's intent, and (2) to evidence the fact that this representation was made, this latter use being dependent on the existence of a design or plan to misrepresent. Wigmore (Evidence, 2nd ed.), discusses the first use in §302 and the second in §304. McCormick (On Evidence) discusses both phases in §164. Plainly the evidence generally was sufficient to warrant the court's treatment of this letter as part of a continuing design or scheme. As to admissibility of subsequent statements, see Wigmore §316.

[24] See 1954 Internal Revenue Code §72(e), 1939 Code §22 (b)(2)(A):

Van Cleve calculated the cost of all of the policies which Knox might have under the Anderson program and on which it was stated that he might withdraw cash at age 65. This cost was calculated at $134,169. Deducting this from the actual value of $217,615 would disclose the taxable profit. Van Cleve's estimates of the amount of such taxes may have been too high as he assumed the entire amount of cash value in the policies would be withdrawn rather than leaving the big amount after payment of the bank loan and withdrawal of enough cash to pay the tax, with the company under the annuity option. The exact amount of such taxes is not material. The witness Stoessel, Anderson's expert, estimated the tax under that state of facts would be $30,000.

ing to Van Cleve, to purchase an annuity of approximately $300 per month. According to Stoessel,[29] it would buy no more than $300 to $400 per month. In selling his program, based primarily on a certain tax advantage, Anderson ignored and failed to mention the tax disadvantages of that same program.

On the question of whether the program was worth the money it would cost him, the court undoubtedly credited the testimony of the witness Black.[29] Black made mathematical calculations based on the figures shown on Anderson's charts and summarized his conclusions for visual purposes on large charts which were introduced in evidence. The figures thus developed by this expert were arrived at after a long period of study and mathematical analysis of the program. No useful purpose would be served by an extensive summary of the conclusions arrived at mathematically by Black, but they do establish beyond any possible doubt the fact that a mere examination of Anderson's charts would not enable any ordinary unskilled purchaser to tell just what he was buying and just what it was costing him.

Under the new program Knox would have an *additional* case outlay which by 1971 would amount to $30,791. This was on the assumption that the interest rates and the tax bracket used in the Anderson schedules were correct. If these outlays were calculated on the basis of an interest rate of 5% and a

[29]Black testified as an expert insurance man, a graduate of the Harvard Business school with extensive experience as a public accountant, as an insurance company manager with experience in estate planning for Hawaiian Trust, an insurance salesman, and as a deputy insurance commissioner where he was chief administrative officer of the insurance laws of the Territory.

tax bracket of 25%, the accumulated additional cash outlay by 1971 would total $58,551. We have noted that those were realistic contingencies.

Black went on to say what this additional cash outlay would secure in the way of additional death benefits under the new program including a surrender value of the Ellen Knox program and other cash benefits. This would have procured additional death benefits of $64,182 in 1953. But if Knox did not manage to die about that time, these additional death benefits, as we have previously noted, would diminish rapidly;—according to Black they would reach $13,371 in 1961, and then gradually increase until 1971 when they would reach $25,129.

Black testified that the Anderson program for a man of Knox's age and earnings would be excessively costly for that amount of protection.[25]

Anderson's witness Stoessel[26] was propounded a hypothetical question concluding with the query

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[25]He was asked to assume that by 1961 Knox's income was $24,000 from that time on, and that he was in a 40% bracket, and to give his answer upon those assumptions (which of course the trial court was not obliged to make). His testimony was as follows: "Q. Assuming that his income were in excess of $24,000 from 1961 on, and that he was in a 40 per cent bracket, would a program that required the cash outlay, additional cash outlay indicated on Line 2 of Exhibit 56-B, that provided the amount of additional death benefits shown by line 1 on the same exhibit, be a suitable program? The Witness: Well it is my opinion that very few men would buy it. I would not recommend that type of coverage, because you are trading dollars, you are putting out almost the same number of dollars each year as you are getting insurance, that is, increase as you are getting protection. It is costly."

[26]Walter J. Stoessel was an associate general agent for National Life Insurance Company. He was a man with some 36 years of experience in the insurance business who had had some experience in the financing of insurance with the bank loan

whether the plan of insurance would provide a program suitable for the Knoxes. He answered: "Yes I think it is a suitable program." In this answer of course he was directly at odds with the testimony of the plaintiff's experts.

An examination of the entire testimony of Stoessel, both on direct and on cross examination, serves to reveal some reasons why the trial court rejected the Stoessel view. The first difference between Stoessel's direct examination and that of Van Cleve's is that Van Cleve not only expressed his general opinion as to unsuitability of the program but he implemented his answer with illustrations based on the schedules showing specific reasons why it could not be considered suitable for a man in Knox's position. These we have previously enumerated in describing Van Cleve's testimony. Stoessel simply expressed a general opinion as to suitability but he did not meet head-on the various points of difficulty which had been brought into the opinion by Van Cleve's testimony.

In one particular Stoessel mentioned what he said was an item of benefit in the proposed program, namely, the waiver of premium contemplated in the New York Life policies. He thought that in the event of Knox's total disability, having his policy remain in effect without further payment of premiums, would furnish Knox a substantial benefit. The main trouble with Stoessel's opinion on this point is that he failed to explain what Knox would use for money to keep up his interest on the bank loan if he became totally disabled.

plan. In this he had been associated with Anderson in the past and he had turned over portions of his business to his son who was currently associated with Anderson.

On cross-examination it became apparent that Stoessel's expressed opinion of suitability was not firmly founded.[27] He admitted that the bank loan plan was one attractive to "individuals in high income tax brackets." When he was asked what he meant by that he said: "40 per cent would permit a man to carry some type of bank financed insurance." He admitted this would be about the minimum tax bracket to make the plan work, "pretty near the absolute bottom line," although there might be some exception made for "the young man on his way up."

The Judge could well conclude that Stoessel's answer of suitability could not be applied to Knox for obviously Knox was nowhere near Stoessel's minimum 40% bracket, and there was nothing to show that he had any prospects of reaching such a stage of income.

Stoessel agreed with Van Cleve that if Knox chose to retire at age 65 and drew down sufficient of the cash surrender values to pay the bank loan, a very substantial tax on the gain would have to be paid. Also on cross-examination he was called upon to calculate the outlays for insurance which Knox would have to make had he kept his old policies as compared to his out-of-pocket expense to carry the new program. The inquiry made of him was what Knox would get in the way of added protection and increased cash values for the additional outlay. When Stoessel got down to figuring that he came out with conclusions not substantially different from those made by Van Cleve and

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[27]Stoessel identified as a part of his own prior published opinion with respect to the bank loan plan the following: "I am opposed to soberation of his business when it does not fit the client's situation or objectives. I agree that its application is limited. I also agree that agents should be made aware of and held responsible for their ethical conduct."

Black, all of which tended to show that he was not getting his money's worth for the increased outlay, just as we have previously noted.

Stoessel admitted that at the initiation of the new program much of Knox's old cash values were gone and that it would take some 13 years of payments before cash values under the new program would reach what they had been at the time the new program was started. He conceded that the Anderson program was such that the protection provided by the new policies would reach a low point in 1961; and his cross-examination served to demonstrate that the increasing benefits thereafter hardly exceeded the outlay that Knox would have to make annually to carry on the program.

It is manifest to us that the trial court was fully justified in rejecting and disregarding Stoessel's general opinion as to suitability.

In a reply brief counsel for Anderson made a strenuous effort to demonstrate with a series of schedules in an appendix that the Anderson program was suitable for Knox and well adaptable to his needs. All that need be said about these is that they are completely unconvincing.

The first contention is that the plan was within Knox's financial means and ability to carry because he could meet the required outlays "almost entirely from his investment (i.e. non-salary) income." Since the exhibits showed that the aggregate of Knox's salary and non-salary income was less than $10,000 a year, and there is no reliable proof as to how or when this would have been increased, Knox was definitely a man of modest income and of far too modest an in-

come to permit him to afford this wealthy man's style of insurance financing.[28]

Next it is attempted to say that this was an especially fine program because the greatest protection was in the early years. Of course, that is true, as we have noted; but the trouble is that the protection slides downhill so rapidly that as Van Cleve noted, the protection reaches its minimum in 1961, just at the time when daughter Marilyn would be 19, son Stephen, 17, and son Roger, Jr., 12. At that time, and the few years immediately preceding and following 1961, Knox would have his heaviest family responsibilities, and it would be the worst possible time for him to die with low protection. To argue that a plan of that kind "is especially well suited to Knox's needs," completely lacks persuasive power with us.

Appellant next undertakes to argue that the 40% tax bracket "was not a misrepresentation but a 20-year projected average reasonably reflecting Knox's expected income pattern." There is not the remotest basis in the record for a finding that Knox would have reached a 40% tax bracket, much less that his brackets would average such.

In another schedule it is attempted to demonstrate that the plan contained a mechanism enabling Knox to support it even if he remained in a 30% bracket throughout his life. The basis for this claimed demon-

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[28]We cannot see what difference it would make whether the amounts that Knox had to pay to carry on the plan were paid out of January and February salaries or his November and December salaries, or out of his non-salary income. The short of the matter is that he could not afford it, and as Stoessel stated, an amount would have to be above or beyond the 30% income tax bracket to make the plan work. "... this was pretty near the absolute bottom line."

stration is a scheme whereby Knox would borrow from the bank not merely the amount of the annual premiums called for but also sums necessary to permit him to pay the interest on the bank loan. Conceding that this system is "not recommended" and "not advisable," appellant says nevertheless that this could be done.[29] Obviously with all these extra borrowings an indebtedness of approximately $125,000 would be increased according to appellant's illustration by $8850 by 1971, and we would assume that if he continued thus for another ten years the indebtedness would have increased by approximately $17,000. How this situation could be said to be helpful or useful to Knox we cannot perceive; all we can say is that we agree with appellant that this system is "not recommended."

In another schedule which appellant says "utterly decimates" Van Cleve's testimony with respect to retirement benefits under the Knox plan, appellant attempts to show how Knox could get an annuity of $524 a month when he reached age 65 by handling his insurance policies in such a manner that no taxable gain would develop.[30] Assuming all this we

[29]Under this claimed scheme, assuming a 30% bracket, Knox would, according to the appellant's calculation, have a net interest outlay in 1963 of $5062, appellant would borrow $950 so that his actual cash outlay in that year would be only $2112. Just how this could be paid solely out of a $1500 investment income is not explained. The calculations are based upon the 3% interest which, as we have noted, is wholly unrealistic, and it also does not take into account what the officers of the bank would say to a borrower who makes public his program to pay the interest owing to the bank by borrowing the same interest from the bank. Just what the bank would do in front of such a customer is not explained.

[30]The schedule on this plan describes the program as follows (we use the appellant's figures just as given): Appellant assumes that on all the policies by 1981 there will be accumulated values of $220,210, that by this time the total loan

wonder how appellant can contemplate the projected situation of Knox at that time and still assert that this proved the plan a suitable one.[31]

It is unnecessary to comment upon some of the other schedules in counsel's appendix. It is sufficient that an examination of them confirms us in our view that the Judge was fully warranted in his findings and conclusions as we have here previously expressed.

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for premiums would be $132,803. Figuring a loan limit of 95% of the total value of collateral, $139,793 worth of collateral must be left with the bank; this would permit the balance or $81,126 free for withdrawal. At that time the $100,000 New York policy would have a cash value of $80,800, so appellant suggests that this policy could be withdrawn from the collateral with the bank and the policy then exchanged for an annuity. This exchange for an annuity under the policy option would not be taxable under Revenue Code §1035(a)(1) and would produce an annuity, according to appellant, of $524 per month. But the other feature of this program, in the words of appellant, was "that Knox would leave all other policies with the bank to secure the loan until Knox's death at which time the proceeds are realizable without tax consequences."

[31] At that time Knox would be a retired man with an annuity of $524 per month and $1500 per year from invested income or a total of $7788 per year. His loan at the bank would be, according to appellant's assumption, $132,803 on which, at the realistic interest rate of 5%, the annual interest would be $6640.15. His income tax would be computed upon the $1500 of investment income which presumably he would still have and upon the taxable proportion of his annuity income. Without computing precisely what this would be, whether figured under the 3% rule of the 1939 Code or under the provisions of the 1954 Code, $2400 would be a fair estimate, we think. This would make a total taxable income of $3900. Assuming that Knox and his wife, then being past 65, made a joint tax return and were entitled to four exemptions, their tax would be about $227; this would then be the maximum amount of tax saving through taking credit for interest paid. This amount deducted from the $6640.15 interest on the bank loan, would give them a net annual interest charge of $6413.15. We then have this elderly couple during their declining years harnessed with the payment of $6413 a year, from a total income of $7780, leaving them for their living expenses $1375 a year or $114.16 a month. What counsel for appellant have omitted from this schedule is a demonstration of how far this sum of $114.16 would go toward paying the rent and the grocery bill.

The Question Of Fraud.

This brings us to the consideration of two questions which we think must be answered together. The first question is: was the representation made by Anderson as to the suitability of this program a representation of fact and not a mere expression of opinion? The second question is: Assuming that we find here a statement or representation of fact, was it made falsely and fraudulently with intent to deceive, or was the representation made with reckless disregard whether it was true or false?[32]

With respect to the first question, dealing with the opinion problem, we think that a fair statement of the applicable rule is to be found in the case of Ed. Barron v. Woodruff, supra, 168 Cal. 501, 126 P. 351. There (p. 356 of 126 P.) the court said: "It is, of course, generally speaking, true that an action for deceit cannot be founded upon the mere expression of an opinion. But the qualifications and modifications of this general rule are as important as the rule itself. Those qualifications and modifications are numerous. It is unnecessary to attempt to illustrate them all. But, bearing in mind that an expression of an opinion, if honestly made, is an expression of what the speaker believes to be a fact, it becomes apparent that by the expression of a dishonest opinion to one entitled to rely upon it, deceit

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[32]Hong Kim v. Hopai, 12 Haw. 485, 488 (1899): "But in such case, it would be necessary to show not only that the representations were false, and that they were false (which are perhaps sufficiently shown by the complaint), but also that they were made by the defendant with knowledge that they were false (or without knowledge whether they were true or false) and in contemplation of the plaintiff relying upon them and also that the plaintiff did rely upon them, which facts do not appear to be shown by the complaint."

is practiced, injury may be worked, and an action will lie. Thus the opinion of an expert employed to report upon a mine would be but the expression of his judgment, and if honestly, though mistakenly, made, of course, no injury cognizable in law, equity, or good morals could result. But instantly that the expert expresses a dishonest opinion, though it still be but an opinion, he has made himself liable in an action for deceit."

This is a rule generally recognized. It has been restated in the Restatement of the Law of Torts, §542 (a),[33] and has received general approval from the text writers.[34]

The question which the trial court had to consider was whether Anderson's statement of opinion was an honest one. If therefore when Anderson spoke he knew or believed his statement to be false or unwarranted, he would be liable, for obviously he expected that Knox would rely upon his statements. In like manner, if he gave this assurance of suitability when he knew that he had no basis for such an assertion, he would be liable for this would be a case of a representation with reckless disregard whether it was true or false.

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[33] §542. Opinion of Antagonistic Party. The recipient in a business transaction of a fraudulent misrepresentation of the maker's opinion upon facts known to the recipient is not justified in relying thereon in a transaction with the maker unless the opinion is material and the maker so holds himself out as having special knowledge of the matter which the recipient does not have. . . ." See the comment (b) under this Section.

[34] Harper & James, The Law of Torts, §7.8. "The general rule is that such statements are not actionable, but it should be noted that the rule applies unqualifiedly only when the statement of opinion stands alone and where the parties are dealing at arms length, on an approximately equal footing as to experience, knowledge and accessibility of the facts."

The trial court found, as noted: "That this representation of suitability was known or ought to have been known to defendant to be false and fraudulent and was made by defendant to plaintiff with intent that he rely upon it in buying said integrated program." Our inquiry is therefore whether that finding is supported by evidence or whether it is clearly erroneous.

In his brief here the appellee takes pains to state that he is not attacking the bank plan as such; that that plan is not on trial; and he concedes that under some circumstances this type of plan may be satisfactorily useful and suitable.

That it has usefulness in some cases we noted at the outset of this opinion. However, it is apparent that a mere look at the characteristic features of the plan is sufficient to make it apparent to any one, and particularly to the trial judge, that it contains within it features which make it inherently a system readily adaptable to sharp practices. In short, any insurance agent using this sytem and familiar with it must be aware of the fact that in employing it he must resist any temptation to overreach a purchaser. The court could well find that Anderson must have known that an indiscriminate use of the bank loan plan was fraught with hazards.[35]

The first weakness of the plan in this respect is its built-in temptation arising out of the inflated commissions.[36] The trial judge could justly raise his eyebrows

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[35] Note the [illegible] supra, [illegible] note 27.

[36] The record [illegible] Anderson [illegible] of the [illegible] Hal Anderson [illegible] Knox, the [illegible] insurance [illegible] Van Cleve testified Knox might re-

in observing the temptation to overselling involved in what he could properly consider to be excessively large commissions.

The second dubious feature of this plan is illustrated by Anderson's inducing Knox to let him have his old policies and to change and convert them by shortening the period for payment, borrowing to produce funds for the bank loan plan, and pledging the policies as collateral under that plan. It is in the course of this process that Knox lost the benefit of the family income rider and found his accumulated cash values gone.[37] When a bank loan plan is sold under circumstances involving the changing and conversion of the purchaser's old policies, the seller, as Anderson must have known, was skirting on the ragged edge of "twisting".[38]

annually pay, for example, an annual premium of $1000. Anderson's initial commission would have been $400. Under the plan as sold, as indicated on schedule Exhibit 10A, Knox's net annual outlay would reach $2618 in 1962 after gradually increasing to that point. If a traditional type policy had been sold by Anderson, even with an initial premium of $2618, Anderson's commission would have been $1047. But when Anderson sold Knox those two policies with annual premiums of $7205 and $3758, his commission was $1409, an amount altogether disproportionate to what might fairly be said to be Knox's ability to pay. And it is to be noted that the funds to pay that came out of the accumulated values in Knox's old policies on which he had already been charged a commission which would be added to the loading in the policies.

[37] It is plain from the record that Knox was not really familiar with the value of his existing policies and as we shall note hereafter the court was justified in believing that Anderson in the course of his selling misrepresented the cost and the values of those policies and what was happening to them.

[38] Cf. Cal. Ins. Code, §781, which contains the following paragraph: "A person shall not make any representation or comparison of insurers or policies to an insured which is misleading, or for the purpose of inducing or tending to induce him to lapse, forfeit, change, or surrender his insurance, whether on a temporary or permanent plan."

A third inherently dubious aspect of the bank loan plan of insurance is that it resembles term insurance in its feature of rapidly diminishing protection. As the charts introduced in evidence, particularly Chart B, made up by the witness Black from the schedules furnished by Anderson, indicated, the protection available under the plan takes a strikingly deep nosedive during the first ten years of the program. A person who dies shortly after purchasing an insurance policy usually profits from term insurance; but its disadvantages are obvious when it is sold under that title. A salesman must know that this aspect of the bank loan plan is not readily observable to a purchaser who is not himself an insurance analyst. This difficulty of understanding extends to the whole plan.[29]

Finally, it should be apparent to any one that the purchase of a comprehensive plan of this kind, such as the one sold to Knox, is fraught with a number of chances and uncertainties, particularly for a person whose income is largely dependent upon his earnings. We have noted heretofore that while the charts furnished by Anderson did not disclose the assumed rate of interest obtainable for the loans contemplated, Anderson had assumed that for the greater portion of the program money would be obtainable at 3½% per annum. The court could well believe that this was a gamble which Knox should not have been asked to undertake. Actually, as we have noted, bank interest rates during the period for which Anderson was making these

[29] "Upon cross-examination Stoessel admitted the correctness of his own previously published statement that "a qualified underwriter presenting the plan will make certain that the purchaser at least understands to begin with what the general scope and coverage is under the new plan as well as under the old insurance."

calculations ran nearer to 5%. Of course Anderson could not foresee what the future would produce but he would know that he was unable to have that foresight and that Knox could not tell either.

Other uncertainties inherent herein we have previously discussed in outlining the testimony of expert witnesses. On the possibility that Knox's tax bracket may not at any time exceed 25%, Van Cleve's testimony showed that the application of these variables or uncertainties could operate to change the charge as assumed $9250 profit into a $12,021 loss.* (Of course for a person on salary there is always the hazard of loss of job or reduction in pay.)"

Anderson knew all these things. He admitted that in March, 1953, at a meeting in Florida, he had heard a discussion of the bank-loan purchase plan in a speech made by a vice-president of New York Life. This was prior to the time he completed the sale of Ellen's policy. He testified that the points made in that speech were substantially the same as those contained in a circular issued by the New York Life Insurance Co. under date of February 19, 1953, which was introduced in evidence

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*Van Cleve was of the opinion that there was another variable or contingency, namely, that the Congress sometime after 10 years might amend the revenue code to deny the deductibility of such interest. That such legislation is not an impossibility is suggested by the fact that in 1954 Congress adopted §264 of the 1954 Revenue Code which section is referred to in Knetsch v. United States, 9 cir., 272 F. 2d 200, affirmed, Knetsch v. United States, 364 U. S. 361. §264 referred to transactions where all premiums are paid within a period of four years. Although the section was made applicable only to contracts purchased on or after March 1, 1954, the decision in the Knetsch case denying the deduction of interest was related to a transaction which preceded that date. It is also possible that the Commissioner might attempt to extend the rationale of Knetsch to a taxpayer in the position of Knox.

in the court below as Exhibit 27.[9] The speaker noted the many assumptions that have to be made in presenting such a plan and the uncertainties attending those assumptions, concluding, "All these things are highly speculative." Another's own correspondence furnishes strong evidence that he was aware of the impropriety of selling this plan indiscriminately to persons of limited income. Some of his letters in the exhibits are written

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[9]The circular contained the text of a speech on the same subject made by the same person who made the speech in Florida. Exhibit 27. It is clear that the author was warning against the indiscriminate use of the bank loan purchase plan because of the danger that in its use "we may be forgetting the high standards of our business." He commented upon the "self interest of the agent to earn a commission," and concluded that "when it is used indiscriminately overselling, misunderstanding and controversies do occur."

The portions of Exhibit 27 here referred to read as follows:

"There is evidence in another area of our field operations that we may be forgetting the high standards of our business. I refer to the so-called 'Bank Loan Purchase Plan' used to finance the purchase of life insurance. Today millions of new business, placed with several highly respectable companies, is being financed by that method.

"The sale and purchase motives in these cases are, I believe, primarily motives of self-interest—self-interest of the agent to earn a commission and self-interest of the purchaser to gain something for nothing. I do not quarrel with the desire to earn a commission nor the desire for financial gain at low cost. But these desires should not be the primary motives in the marketing of life insurance.

"Insurance lawyers have the right to finance the purchase by any legal method available. I do not intend to say or imply that the Plan is illegal in any way. There may be an occasional instance when its use is practicable and will result in legitimate tax savings. But when it is used indiscriminately overselling, misunderstanding and controversies do occur.

"This is a complex selling process requiring many assumptions to prepare and present an elaborate set of figures which illustrates or projects expected performance over a period of years in the future.

"The first basic assumption or uncertainty is that the prospect as a standard risk will be so classified, the premium and cash values for the policy issued will not be those stated

on stationery carrying on the reverse side a reprint from "The National Underwriter" for August 8, 1947, headed "Bank Loans to Buy Policies Again Popular with Wealthy." The article begins: "High income tax rates, low bank loan rates and the high reserves under Guertin-law contracts have combined to provide a big market *among wealthy men* for limited payment policies". (Emphasis ours)

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in the first figures submitted and the other figures in it will change correspondingly.

"Many other assumptions are needed to complete the projection figures. It is assumed that over a long period of years dividends will be apportioned under scales equal to the current scale; that the practice of discounting premiums at a specified discount rate will be continued; that the basis for settlement of prepaid premiums will not be changed; and that the practice of undertaking to refund advance premium payments before the insured's death will be continued. All these things are uncertain.

"With respect to the proposed bank loan it is assumed that the required margin over policy and prepaid premium values will not be increased; that the bank's interest rate will not be increased; that the bank will finance all premium payments; and that the bank will carry the loan indefinitely. All these things are highly speculative.

"The very core of the Plan's appeal is the hoped for tax savings. It is assumed that the tax law will not be changed; that the interest deduction will be allowed for income tax purposes throughout a long period of years; and a very optimistic assumption that the prospect's top income tax bracket will continue for a similar period to be about fifty percent or higher.

"Personal fortunes change and under any tax law, tax consequences can be stated as of the present only. Such tax advantages as the law now gives can be wiped out overnight. When a method of avoiding taxes appears and is widely used, the loophole is usually closed. A few years back bank loans were used to buy single premium endowments with the sole object of taking the loan interest deduction for income tax purposes. It was a similar tax avoidance method. That loophole was closed.

"A mere recital of the many uncertainties assumed to be true for the purpose of illustrating and selling this plan indicates the many possibilities of error and misunderstanding and the many chances that the policyholder's expectations may never be realized."

Thus the trial court would be warranted in finding that Anderson knew when he sold Knox his program the dangers probable in case of an indiscriminate use of the bank loan plan.[42]

But from Anderson's own testimony the trial court could conclude that Anderson was unconcerned about these matters. The cross-examination of Anderson by

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[42]These inherent hazards of the plan were subsequently discussed at length in a regulation issued by the Insurance Department of the State of New York directed to all life insurers authorized to do business in the State of New York. That regulation, No. 30, referring to this type of policy, under the term "minimum deposit plan" is dated July 31, 1959. It notes that such plans "lend themselves to unsound and inequitable practices"; that in effect this type of financing is to provide coverage which "decreases from year to year due to the increase in the loan indebtedness while the cost of the coverage increases due to the increase in the loan interest"; but this is therefore "essentially decreasing term insurance"; and notes that the effect is to pay the agent a first year commission "which may exceed 90% of the initial cash outlay"; that existing regular policies have been replaced by these new minimum deposit policies and that "the replacement of existing insurance by new policies is generally not in the best interest of either insured or insurer." It is noted that such replacement has in many instances been effected by "withholding from the insured information essential to a proper decision . . . and unfair trade practice and detrimental to the public interest." The regulation therefore put a limitation up to the permissible commission, required insurance companies to report first year premiums and commissions, and required the companies to issue written instructions incorporating stated safeguards in the preparation and use of cost illustrations, contracts, advertising and other promotional material, and to require clear presentations of the decreasing death benefit plans sold and that the company should prohibit "misrepresenting the terms, benefits or advantages of any policy or contract, misuse of dividend estimates, misleading representations and misleading comparisons." It was provided that where existing insurance was to be replaced, notice must be given to the insurer which issued the old insurance so that the insured could be advised as to that company. Of course Anderson was not charged with knowledge that any such regulation was in the offing but these aspects so discussed would appear to be self-evident.

counsel for Knox endeavored to find out his thoughts and mental attitude with respect to the suitability of this program at the time of sale. For a considerable period of his testimony Anderson evaded the question. The court intervened telling him that "counsel is trying to find out how you felt at the time of this transaction, specifically whether or not you felt that you owed a duty to protect the Knoxes against what in your opinion might be poor judgment in deciding how much insurance to take under this proposed loan financed plan." The witness evaded this question by stating that he went to the time and expense to prepare the schedules so that the Knoxes themselves could decide. Finally, however, the testimony was as follows: "The Court. Let's go over it again. From the answers you have given me, I take it that you are saying, no, that you felt you owed them no duty to protect them against any bad judgment that in your opinion they might be exercising in relation to the insurance that they had decided to purchase? The Witness. I guess that's right with this qualification, that it was their responsibility to determine what they should buy and could buy. I was selling life insurance. But at the time I felt I was using the judgment of the insuring company in the amount that would be issued. As to what they decide, what they should buy, is their responsibility."

We believe that this answer alone would be sufficient to warrant the trial judge in finding that Anderson, in making his representations respecting the suitability of the program did so with reckless disregard as to whether his representation was true or false.

In this same connection Anderson's own testimony is that he did not undertake to draw up a suitable program of insurance for the Knoxes. "I didn't do any exten

sive planning because that was not my field. I simply submitted the policies that were applied for and they made the decision as to what they wanted to purchase." He did little personally to inform himself as to the facts relating to Knox, his income, his resources and his old insurance program before he undertook to sell the plan to him.[43]

This complete detachment is consistent with other circumstantial evidence in the record. Kreidler testified that he had attempted to argue with Anderson that the $100,000 policy was more than Knox could afford. He was told by Anderson that he, Anderson would make that decision; but Kreidler went on to explain that one reason why he could not get along with Anderson, one point of difference with him was that he did not believe in overselling people who could not afford to carry large amounts of insurance with large premiums. He said that it was Anderson's practice to determine the size of the new bank loan policy to be sold to a customer by ascertaining the total amount of cash values and dividends of the purchaser's old contract. The question

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[43]When Kreidler first went to Knox to procure the old policies he obtained the sort of information and put it on an information sheet which he sent to Anderson. At the same time Knox had sent the application for the insurance to New York directly from Honolulu. Anderson testified that in those cases where Knox submitted the application directly to the insurance company, it was not his Anderson's practice to look at those information sheets. "It was technicialities that I did not check into." He said that his office staff made up the schedules and handed them to him and he proceeded to present them to Knox. "It wasn't my custom to check the information sheets." When asked what study he made in preparation for giving advice to the Knoxes, Anderson replied: "My associates at the office had Mr. Knox's policies that had been given to them and from those policies they listed the information on this schedule and I then analyzed the schedule on the way to them, looked over it carefully and then went over it in detail with Mr. and Mrs. Knox."

was: what would those old contracts purchase in the way of premium? That this was the circumstance which actuated Anderson in selling the program can be inferred from the fact that after Anderson's first contact with Knox in November, 1952, it developed that Knox had other insurance with additional loan values. With this knowledge Anderson proceeded to sell the policy on the life of Ellen and the additional loan values were plowed into the new premium. It was then, as we indicated above, in discussing Van Cleve's testimony, that the total amount of insurance was raised by another $50,000."

So here we have Anderson, not examining the information sheet as to Knox's financial condition, leaving it to his office staff to prepare a schedule, not undertaking himself to draw up a fit or suitable schedule, undertaking no responsibility in that regard, deciding how much insurance he would sell solely on the basis of how much could be borrowed on the old policies, and then approaching Knox who, under his directions, had been suitably prepared to accept Anderson as an expert and a specialist, and telling him that here was a suitable plan, well adapted to his means and needs. The court's finding of fraud would have appeared to have been inevitable. These circumstances alone justify a conclusion that Anderson's representation of suitability, of his honest opinion thereof, was made with that

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[11] Mrs Kreidler testified: "The practice was to make a calculation of the values that were in the old contracts. That would usually indicate how much new insurance a prospective client could buy."

Van Cleve testified that on a sale of the Ellen policy all but $500 of the collateral value of the old policies was used up.

reckless disregard of the truth which is the equivalent of intentional fraud and deceit. Indeed, an inference of an intent to cheat and deceive was warranted.

True, Anderson denied that he represented the plan to be a suitable one. He testified: "Was it not apparent to you that they were relying upon you as a person with skill and experience specialized in bank loan plans? Is that a fair statement? A. . . . They were making their own decision. I presented the schedules and they made their own decision. I was in the business of selling insurance and told them so, that I would like to sell some insurance if there was a need for it and if they wanted it." Why the trial court disbelieved Anderson is apparent even from the cold record. His evasiveness, his lack of frankness, furnish what must have seemed to the Judge a classic example of what Judge Learned Hand described in Dyer v. MacDougall, 201 F. 2d 265, 269: "Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."[15]

The trial court must necessarily have taken into consideration the considerable number of misstatements, partial statements, omissions and non disclosures which oc-

[15]After many pages of questioning, plaintiff's counsel finally elicited the following equivocal testimony: "Did you express a judgment that it was a suitable plan for them, or an opinion? A. Oh, I may have expressed an opinion as a salesman, yes. I believe in insurance and I believe it was necessary and they believed it was necessary. There was a 'meeting of minds.'"

curred in the course of Anderson's sales talks and presentations. Of course in the process of analyzing and selling a program as complicated as this one a few wrong statements or omissions would be consistent with honest mistakes; but here the trial court had before it so many of these misstatements and nondisclosures that it was justified in concluding that the opinion of suitability was not an honest one.[46]

As this court stated in Midstates Insurance Co. v. American Fidelity Cas. Ins. Co., 234 F. 2d 721, 729, "[O]ne who undertakes to make statements under circumstances such as this is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those statements. 'If he speaks at all he must make a full and fair disclosure.'" This is particu-

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[46]The use of a 40% bracket in preparing the November, 1952, schedule, (Exhibit 4) might be an error or oversight. But when the same inappropriate percentage figure is made the basis of the calculations in the May, 1953, schedule, (Exhibit 8) and again in Exhibit 10B the following September, the Judge could well conclude that Anderson just didn't care.

Also, there was a mistake in the amounts borrowed. Anderson's contact with the bank borrowed $3788 more than needed, and these amounts are included in the schedule Exhibit 10B. Yet this was never discovered by Anderson until the eve of the trial, a rather surprising proof of inattention. What inference was the judge to attach to the loss of the family income rider, never explained to Knox; to the statement in the letter, Exhibit 10B, that Knox was paying $2005 a year in premiums on his old policies, when the actual amount was 671? (Anderson had the policies.) The first schedule, Exhibit 4, represented the cash values of the old policies as $9007, when in truth they were nearly $16,000. This $9007 is obtained by abstracting from 10,594, appearing near the bottom of the first column on page 800 of 159 F. Supp., the totals of the dividends there listed. The balance represents the cash values of Knox's policies. At the time that exhibit was made Anderson was not aware of a Prudential policy but it represented only a small fraction of the discrepancy.

larly true where one party to a deal, though in no sense a fiduciary, is possessed of superior knowledge as to facts material and important to the transaction which he fails to disclose to the other party. This duty of full disclosure has been noted in the Hawaiian decisions.[46a]

With a record such as this we find it impossible to hold clearly erroneous the finding of the trial judge that Anderson's expressed opinion of suitability was not an honest one but was made fraudulently and with intent to deceive; particularly because the facts clearly warrant a determination that Anderson made his representations recklessly in disregard of whether they were true or false.

The court could fairly infer from the circumstances here that Anderson's sole interest was in collecting his immense commission; that he felt no responsibility whatever, as he himself indicated, with respect to the truth or falsity of his representation of suitability. Indeed, the court might well regard seriously the argument that any insurance agent who would sell a man

[46a]Wilcox v. Ellis, 5 Haw. 335, where the seller of stock of an ice company concealed from the purchaser his knowledge of the fact that a new ice company was about to be formed in the community, a fact which would diminish the saleability of the stock. The court found there was a duty of disclosure; that the transaction was tainted with fraud and it was set aside. Cf. Harper & James, The Law of Torts, §7.14, p. 580: "In the first place, it has been held that although ordinarily, in the absence of special circumstances, there is no duty imposed upon one party to a transaction to speak for the information of the other, nevertheless if he does speak with reference to a given point of information, voluntarily or at the other's request, he is bound to speak honestly and to divulge all the material facts bearing upon the point that lies within his knowledge. Fragmentary information may be as misleading and as deceptive as active misrepresentation, and half-truths may be as actionable as whole lies and sometimes properly be regarded as actual concealment."

with Knox's limited income and prospects an insurance program that involved saddling him with a bank indebtedness of $125,000, an essentially term insurance type of protection, and dissipation of the accumulated cash values of his old insurance, must have known that he was not acting honestly in making the sale.

We hold therefore that the record sustains the court's findings, first, as to the representation alleged; second, that the representation was false, and third, that Anderson either knew and intended it to be false, or made the representation with reckless disregard of the facts.

Damages.

This brings us to the question of damages.

The trial court awarded Knox compensatory damages in the sum of $13,309.98 plus interest, exemplary and punitive damages in the sum of $10,000, and damages for "grievous mental anguish and great distress of body and mind" in the sum of $2500. (See 162 F. Supp. at p. 344). As to the amount of compensatory damages the evidence showed that after Knox had received the revised schedule, Exhibit 10A, and the letter of transmittal, Exhibit 10B in September, 1953, he gave these to a friend who was an investment broker and asked his advice. This friend in turn called in an employee of Prudential Life Insurance Company who analyzed Knox's program; and in consequence of this analysis Knox sought to cancel his program. He decided that he could not go on with either of the two New York Life policies and sought to cancel those out on a basis of payment for coverage to-date on a term insurance cost basis. Had Anderson been willing to agree to that and to surrender his commission, that might have been done; but Anderson refused to make any concessions

purportedly on the ground that Knox had violated the stipulation which Anderson had written at the head of each schedule: "It is agreed that this schedule will not be shown, directly or indirectly, to any insurance competitor".

Knox was therefore obliged to help himself in the only way possible. His old policies had been pledged for the purpose of initiating the New York Life policies. He cancelled the program by surrendering the New York Life policies, his three Sun Life educational endowment policies, the Sun Life paid up policy, and by converting the remaining policies from limited payment forms to ordinary life. This provided the proceeds to discharge the bank loan.

At the same time Knox got a cash refund from the bank loan of $239.74, and it was stipulated that against his costs, including the proceeds of the policies mentioned and the conversions mentioned plus interest paid to operate the Anderson program, credit was properly allowed for the cash refund and for the cost of coverage under the Prudential and the John Hancock policies in their original forms. These debits and credits, the proceeds of surrenders and conversions, the interest costs and the credits aforesaid, were stipulated. Calculated in this manner, Knox actually lost $13,309.98. We think this amount was properly awarded as compensatory damages.

With respect to the award of exemplary damages, the rule established by the Hawaiian decisions appears to be that commonly recognized elsewhere, namely, that they may properly be awarded in addition to the actual or compensatory damages where recovery is had for wilfull, oppressive or wanton commission of a tort.

The rule was stated in Bright v. Quinn, 20 Haw. 504, (1911), as follows: "Such damages may be awarded in cases where the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations' . . . or where there has been 'some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.' . . . In such cases a reckless indifference to the rights of others is equivalent to an intentional violation of them." (p. 512)

It is generally recognized that actions for deceit are included in those cases in which exemplary damages may be properly awarded.[47] It is our view that under the Hawaiian law the award of punitive damages was proper.[48]

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[47]See Hobbs v. Smith, 27 Okla. 830, 115 P. 347. Also, Waters v. Novak, 94 O.A. 347, 115 N. E. 2d 420. (In this case, seeking recovery for deceit, the court submitted to the jury the question of awarding exemplary damages by an instruction stating: "Malice consists of bad motive or such wanton and reckless disregard of the rights of others as to show evil intent." Upon appeal from a judgment including exemplary damages, the court approved that instruction; and in discussing what constituted active malice quoted from Gott v. Polsifer, 122 Mass. 235, 239, its statement that such malice "may consist either in direct intention to injure another, or in reckless disregard of his rights and of the consequences that may result to him." To the same effect see Finkey v. Bover, 331 Mo. 1242, 56 S. W. 2d 372, and Laudriani v. Lake Mohawk Country Club, 26 N. J. S. 157, 97 Atl. 2nd 511.

[48]This case was tried before Hawaii had become a state. The trial judge, if not required to accept the Hawaiian decisions under Erie Railway Company v. Tompkins, 304 U. S. 64, was required to do so under the same principles which were laid down in Waialua Co. v. Christian, 305 U. S. 91, 109. See also Glover v. L. K. Fong, 40 Haw. 503; Howell v. Associated Hotels, 40 Haw. 492; and Jendrusch v. Abbott, 39 Haw. 506.

The award for mental suffering presents more difficulty. There is in the record a substantial amount of evidence tending to show that Knox did become greatly distressed and disturbed mentally and emotionally in consequence of what had happened to him by reason of what the court has held was the fraudulent misconduct of Anderson.

The testimony was that his distress and anguish came about when he realized that he had lost a large part of the values of his old insurance policies; when he had to surrender the Sun Life policies on which he had been relying for the education of his children he suffered great distress and was continually brooding upon what then appeared to him to be an irreparable loss and a terrible blow. He was difficult to live with and he was unable properly to attend to his work.

There is no doubt but that the trial court was warranted in believing that Anderson in refusing to accept a rescission of the whole arrangement attempted to aggravate the matter by writing to the vice-president of the New York Life Insurance Company advising that company that he, Anderson, was not disposed to cooperate in any way with the reduction of the insurance for the Knoxes, and recommending that no refund be made to them and that they not be given any special consideration.[49]

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[49]After Knox had taken up with the New York Life the question of cancelling his policies and getting out of the deal as cheaply as possible, the Company's vice-president evidently made inquiry about the matter. On November 6, 1953, Anderson wrote the vice-president at great length giving his version of the sale of insurance to Knox. Besides stating that it was Knox and his wife who had made up their own minds about the size of the insurance policies and blaming Kreidler for procuring the applications for the insurance, Anderson told how he had recently discovered by chance that Knox's papers, in-

As noted by the text writers and in the more recent revisions of the Restatement of the Law of Torts, the rules relating to recovery for emotional distress, whether accompanying trauma or other injuries, or otherwise are in a developing and changing area of law. It is noted in a 1948 revision of the Restatement: "This is a part of the law of torts in which real developments have occurred in recent years and this development is continuing." Accordingly the American Law Institute in that revision changed the rule formerly stated on this subject and made the restatement now appearing in §46 as follows: "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it."

Harper & James, (§18.4) noted that "There has been an extension of liability along this line in recent years." In the case of United States v. Hambleton, 9 cir., 185 F. 2d 564, 566, this court had occasion to discuss at some length the reason for the 1948 revamping of §46 of the Restatement of the Law of Torts, in connection

cluding letters from Anderson, had gotten into the hands of the Prudential Life Insurance Company's agent." He said that he then talked to Knox who admitted that this was in violation of the agreement stated on the schedules. He said in his letter: "Now I don't feel disposed to cooperate in any way in the reduction of insurance for Mr. and Mrs. Knox. And from the correspondence the photostats of the schedules and other information I am sure that you will concur that this insurance was placed by us and accepted by Mr. and Mrs. Knox in good faith. . . . It is most unfortunate that these people have permitted themselves to be jockeyed into such a position by the critics whose actions are prompted by jealousy and lack of knowledge concerning the 'modus operandi' of my program. . . . Under the circumstances, Dudley, I cannot recommend that any refunds be made to these people and humbly state that it would be a miscarriage of justice if any special consideration were given to them over anyone else, especially in view of the methods by which they have proceeded to handle the situation."

with our discussion of the law of the State of Washington and that court's adoption of the new attitudes of the courts upon the question of a recovery for damages for emotional distress. The Hawaiian Supreme Court has gone along with these more recent advances. The leading case is Fraser v. Blue Cross Animal Hospital, 39 Haw. 370. There the court noted the early decisions refusing remedy for mental suffering unless the same was connected with other injuries suffered from an independent tort. The court then said (p. 373): "The modern cases recognize that the intentional infliction of mental suffering may, standing alone, constitute a tort and serve as the basis for an independent action.' This is set forth in Restatement, Torts, §312, as follows: 'If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause. . . .' An excellent discussion of the intentional infliction of mental suffering as a 'new' tort in itself is contained in 37 Mich. L. Rev. 874. It contains a full discussion of the authorities and the statement . . . that 'The rule that damages cannot be recovered for mental suffering unaccompanied by physical injury is not applicable when the wrong complained of is a *willful* one intended by the wrongdoer to wound the feelings and produce mental anguish and suffering, or from which such result should be reasonably anticipated as a natural consequence.' "[50]

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[50]In that case the plaintiff sought recovery for mental suffering alleged to have been inflicted upon her because of numerous telephone calls to her residence demanding payment of sums which she did not owe. The court held that the complaint

We have here then a case of an intentional tort in the sense that the defendant acted in reckless disregard of the rights of the plaintiff. In the language of Bright v. Quinn, supra, such reckless indifference was equivalent to an intentional violation of such rights. The question is whether such conduct on the part of the defendant as the trial court has found him guilty of, actually caused and was calculated to cause severe emotional distress to the plaintiff; and whether the trial court could properly hold that such conduct was both unreasonable and such that the defendant could recognize as likely to result in mental distress and illness.

The trial court had the right to view the acts and conduct of Anderson in their entirety as a part of a plan to collect a large commission with reckless disregard of what the proposed program would do to Knox, and particularly to Knox's existing insurance policies. A part of the whole picture of Anderson's conduct was his letter to the New York Life Insurance Company's vice-president, above referred to, and its manifest effort to prevent Knox from extricating himself at minimum expense from the situation in which he had been placed. The court could rightfully regard that last act of Anderson as a further, wilfull and intentional effort to disadvantage Knox. We think the court could fairly say that in all this Anderson should have known that Knox

was defective for failure to allege that the acts of the defendant were unreasonable or beyond the bounds of decency so that the defendants should recognize such acts as likely to result in the illness of the plaintiff. The holding was simply that a demurrer to the complaint should have been sustained. The case was remanded for further proceedings. We assume that on such remand the court would permit amendments to correct the defective pleadings so as to state a case for the recovery for mental suffering which the court held, as above indicated, would be properly recoverable if the act was intentional, unreasonable and one such as should be recognized as likely to result in illness.

would be greatly distressed and upset over the loss of those resources on which he was counting for the education of the children.

We hold that the award of damages for mental suffering must be sustained.

The judgment is affirmed.

Chambers, Circuit Judge, concurring:

The foregoing exhaustive opinion gives me no trouble as to liability. In short, I regard it as a reasonable inference that the multiplicity of figures given to Knox were not intended to enlighten but were intended to put a film of sweet lusciousness over the shell of a bitter cocoanut.

As to the element of damage for mental suffering, I cannot yet say I am satisfied with the American Law Institute's work in the field. Some day I may be. Fraser v. Blue Cross Animal Hospital, 39 Hawaii 370, convinces me, in a diversity case, I should concur in the allowance for that item. In another case from another state, the question will have to be reexamined.

If history repeats itself, many good insurance men will be encouraged to be alarmed that this decision puts their livelihood in jeopardy. There is no reason to think so. The answer is: "Read the facts—if you have a full hour to do so."

(Endorsed) Opinion and Concurring Opinion Filed Dec. 4, 1961.

Frank H. Schmid, Clerk.

APPENDIX "C."

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

J. Leland Anderson, Appellant, vs. Roger I. Knox, Appellee. No. 16,196.

Feb. 28, 1962.

Before Chambers, Chief Judge, Pope and Hamlin, Circuit Judges.

Per Curiam:

On the last day of the extension of time granted for filing of a petition for rehearing herein, the appellant filed an application for leave to file a petition for rehearing consisting of 36 typewritten pages together with an appendix of approximately the same length. With the motion appellant lodged with the Clerk his proposed enlarged petition.

Upon consideration of the application for leave to file the petition, and upon examination of the petition itself;

It is ordered that leave to file the petition as requested be, and the same is hereby granted.

It is further ordered that the said petition for rehearing be, and the same is hereby denied.

The petition has appended under the heading of "Appendix B" what is asserted to be a copy of an instrument executed May 27, 1958 by Knox acknowledging receipt by Knox from one William Van de Carr of a sum which petitioner asserts was the $3788 of overborrowing referred to in footnote 46 of the court's opinion. Whether such a sum was paid is not a part

of the record of this court as the judgment of the trial court, entered April 18, 1958, preceded the date of the claimed payment. See the trial court's opinion, 159 F. Supp. 795, at p. 800. If after judgment some payment was made which should be credited on the judgment, that is a matter to be determined by the trial court after the return of the mandate. Such a question is not to be litigated in this court now and should not delay the effective date of our mandate.

(Endorsed) Order on Petition for Rehearing Filed Feb. 28, 1962.

Frank H. Schmid, Clerk.

Supreme Court

October Term, 1962

No. 908

Petitioner,

Respondent.

Counsel for Respondent.

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In the Supreme Court
OF THE
United States

October Term, 1961

No. 908

J. Leland Anderson,
Petitioner,

vs.

Roger I. Knox,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 297 F. 2d 702, and of the United States District Court for the District of Hawaii at 159 F. Supp. 795, and its Findings of Fact and Conclusions of Law at 162 F. Supp. 338.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does Petitioner's dismay at the unanimous decision of the Court of Appeals sustaining the judgment based upon the findings of fact of the District Court raise constitutional or federal questions?

2. Is not Petitioner's bad faith in filing the petition herein apparent on the face of the record?

STATEMENT

Petitioner, through fraud and misrepresentation, induced Respondent to purchase insurance policies as part of a bank financed plan. After trial without a jury, the trial court gave judgment to the Respondent supported by detailed findings of fact and conclusions of law.

On appeal, the judgment was affirmed on the basis that the findings of fact were fully sustained by the evidence.

On motion for rehearing, Petitioner alleged without record foundation that because the Court of Appeals had changed the legal basis of the judgment, there was a denial of "due process" and "by analogy to *ex post facto* constitutional provisions", there was a violation of Petitioner's rights. This petition for rehear-

ing purporting to raise federal and constitutional questions, cannot adequately be paraphrased.

REASONS FOR DENYING THE PETITION

I. THERE ARE NO FEDERAL QUESTIONS REQUIRING EXAMINATION BY THIS COURT.

Petitioner has introduced to this Court several alleged federal questions which were raised for the first time in Petitioner's Petition for Rehearing before the United States Court of Appeals for the Ninth Circuit, on or about February 12, 1962.

A factual and legal determination of the elements constituting fraud under the common law of the State of Hawaii does not involve a federal question. It is elementary that a plaintiff "may not drag in the federal question by its heels". 2 Moore, Federal Practice (1961 ed.) Par. 2.07 [2] and cases cited therein.

II. THERE ARE NO HAWAII OR FEDERAL CASES INVOLVING FRAUD AND DECEIT IN CONFLICT WITH THE COURT OF APPEALS' DECISION.

This case (to quote the language of the United States Court of Appeals for the Ninth Circuit in its Order upon Motion for a Further Stay of Mandate) "is an exceedingly simple one. Aside from a minor question relating to the measure of damages recoverable under Hawaii law (the sole question is whether the evidence in the court below was sufficient to sustain the trial court's finding of fraud and deceit".

Petitioner does not cite any fraud and deceit cases at variance with the decision of the Court of Appeals or the District Court. The cases cited do not indicate that the factual findings and legal conclusions of the Court of Appeals are in conflict with any Hawaii or Federal cases.

Under Rule 52(a) of the Federal Rules of Civil Procedure, an appellate court will not set aside the findings of fact unless clearly erroneous. The Petition reiterates a discontentment with the findings of fact that the Petitioner was the perpetrator of a fraud upon the Respondent. The granting of the petition for writ of certiorari is inconsistent with the conclusiveness of the trial court's findings of fact based upon substantial evidence as disclosed by the record. *U. S. v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950); *Young Ah Chor v. Dulles*, 270 F. 2d 338, C.A. Hawaii (1959); *National Lead Co. v. Western Lead Products Co.*, 291 F. 2d 447, C.A. Cal. (1961); *Cordoran Associates, Inc. v. Dayton Rubber Co.*, 290 F. 2d 858, C.A. Ohio (1961).

III. THE RECORD IS SILENT ON THE PUBLIC IMPORTANCE AND IMPACT OF THIS CASE UPON THE INSURANCE INDUSTRY AND THE ASSERTIONS REQUIRING A CLASS ACTION.

Petitioner labels this effort in the nature of a class action by stating that he is representing 225,000 to 300,000 fellow insurance agents. There is no basis in the record for this implication, or for any assertion

that the standard of actionable behavior of vendors of insurance has been affected by this decision. (See last paragraph of Concurring opinion of Circuit Judge Chambers in Circuit Court of Appeals opinion.)

IV. THE COURT OF APPEALS' DECISION AFFIRMS THE DISTRICT COURT'S FINDINGS OF FRAUD AND DECEIT.

Petitioner alleges that he has been surprised by the Court of Appeals' departure from the grounds of the decision of the District Court. The findings of fact in the District Court's opinion, 162 F. Supp. 388, are based on a common law action of fraud and deceit and not, as petitioner alleges, a violation of a fiduciary duty.

V. FILING OF PETITION FOR WRIT OF CERTIORARI IS FRIVOLOUS AND VEXATIOUS.

Respondent seeks just damages for the delay caused by the filing of the petition for writ of certiorari and such costs incurred thereof in accordance with Supreme Court Rule 56(4).

The Order upon Motion for Further Stay of Mandate by the United States Court of Appeals for the Ninth Circuit, dated March 31, 1962, states after referring to the actions of the Petitioner with respect to making his property unavailable to the judgment creditor, in part on pages 6 and 7 as follows: "We are obligated to find and do find that the application for the further stay of mandate is not made in good faith."

Authority for this Court to assess damages for the frivolous and vexatious delay caused by the Petitioner is found in *Roe v. Kansas ex rel. Smith*, 278 U.S. 188, (1929); *Deming v. Carlisle Packing Co.*, 226 U.S. 102, (1912); *Amory v. Amory*, 91 U.S. 356, (1876); *Louie v. Willacy*, 239 F. 2d 179, C.A. 9th (1956); *In re Midland United Co.*, 141 F. 2d 692, C.A. 3d (1944); *Occidental Life Ins. Co. v. Eiler*, 125 F. 2d 229, C.A. 8th (1942); *MacDonald v. Winfield Corp.*, 104 F. Supp. 609, D.C. E.D. Pa. (1952).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied. The Respondent further prays this Court adjudge to this Respondent his damages pursuant to Rule 56(4) of the Rules of this Court for the Respondent's delay.

Dated, Honolulu, Hawaii,
May 21, 1962.

Respectfully submitted,

J. RUSSELL CADES,
Counsel for Respondent.